Supreme Court, U.S.
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No. 09-1115

In The
Supreme Court of the United States

ERIK SAMMIS, INDIVIDUALLY AND JIMMY EVANS, INDIVIDUALLY,
Petitioners,

v.

UNSELD NANCE, SR., INDIVIDUALLY AND AS THE NATURAL FATHER AND NEXT FRIEND OF UNSELD NANCE, JR., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 15, 2010

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QUESTIONS PRESENTED

Whether the Eighth Circuit departed from established principles of qualified immunity in holding that a police officer may be held liable on a claim under 42 U.S.C. § 1983 for failing to act to prevent another officer's use of force where the use of force occurred within a short interval of time such that a reasonable officer faced with the same circumstances would not have had a realistic opportunity to intervene.

Whether the commands "get on the ground, drop the gun" are sufficient to satisfy the warning required to be given prior to the use of deadly force.

Whether a party's self-serving testimony that contradicts his or her prior statement is sufficient to create a fact question and thereby avoid an adverse summary judgment ruling on the defense of qualified immunity.

LIST OF PARTIES

Petitioners: Erik Sammis ("Sammis") and Jimmy Evans ("Evans")

Respondents: Unseld Nance, Sr. individually and as the natural father and next friend of Unseld Nance, Jr.; Pamela Farrow; and Debra Farrow and Robin Perkins, individually and as co-administrators of the Estate of DeAunta Farrow.

Defendants and Respondents Below: City of West Memphis, Arkansas; Robert Paudert; and William Johnson.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

INTRODUCTION 2

STATEMENT OF THE CASE 5

A. Factual Background 5

B. Procedural History 7

REASONS FOR GRANTING THE WRIT 8

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW REGARDING THE FAILURE TO INTERVENE CLAIM CONFLICTS WITH *GRAHAM V. CONNOR* AND THE DECISIONS OF OTHER CIRCUIT COURTS. 8

II. CERTIORARI IS WARRANTED BECAUSE THE EIGHTH CIRCUIT'S DETERMINATION THAT THE

COMMANDS "GET ON THE GROUND, DROP THE GUN" WERE NOT SUFFICIENT TO SATISFY THE CONSTITUTIONAL STANDARD FOR A WARNING GIVEN PRIOR TO THE USE OF DEADLY FORCE IS IN DIRECT CONFLICT IN *TENNESSEE V. GARNER* AND CREATES A SPLIT OF AUTHORITY IN THE CIRCUIT COURTS. 15

III. THE EIGHTH CIRCUIT'S ERRONEOUS RULING THAT THE PLAINTIFF'S DEPOSITION TESTIMONY, WHICH CONTRADICTS HIS OWN EARLIER VIDEOTAPED AND WRITTEN STATEMENT, WAS SUFFICIENT TO CREATE A FACT QUESTION AND PREVENT A SUMMARY JUDGMENT RULING IN FAVOR OF THE DEFENDANTS ON THE BASIS OF QUALIFIED IMMUNITY VIOLATES THIS COURT'S HOLDING IN *SCOTT V. HARRIS*. 18

CONCLUSION 25

APPENDIX

Appendix A: Opinion/Judgment, United States Court of Appeals for the Eighth Circuit, filed November 10, 2009 ..... 1a

Appendix B: Order, United States District Court Eastern District of Arkansas, filed February 5, 2009 ..... 20a

Appendix C: Order, United States Court of Appeals for the Eighth Circuit, filed December 15, 2009 ..... 97a

TABLE OF AUTHORITIES

Cases

Behrens v. Pelletier,
516 U.S. 299 (1996) 16

Bruner v. Dunaway,
684 F.2d 422 (6th Cir. 1982)(per curiam) 12

Catlin v. City of Wheaton, et al.,
574 F.3d 361 (7th Cir. 2009) 15

Ensley v. Soper,
142 F.3d 1402 (11th Cir. 1998) 12

Floyd v. City of Detroit,
518 F.3d 398 (6th Cir. 2008) 13, 14

Gaudreault v. Municipality of Salem,
923 F.2d 203 (1st Cir. 1990) (per curiam) . 12, 13

Graham v. Connor,
490 U.S. 386 (1989) 8, 11, 13, 14, 24

Halperin v. Abacus Tech. Corp.,
128 F.3d 191 (4th Cir. 1984) 19

Hernandez v. Jarman,
340 F.3d 617 (2003) 22

Johnson v. Jones,
515 U.S. 304 (1995) 4, 19

Krout v. Goemmer,
583 F.3d 557 (8th Cir. 2009) 12

Krueger v. Fuhr,
991 F.2d 435 (8th Cir. 1993) 17

Martin v. Merrell Dow Pharms., Inc.,
851 F.2d 703 (3rd Cir. 1998) 19

Mick v. Brewer,
76 F.3d 1127 (10th Cir. 1996) 12

Ngo v. Storlie,
495 F.3d 597 (8th Cir. 2007) 23

O'Neill v. Krzeminski,
839 F.2d 9 (2nd Cir. 1988) 11, 12, 13

Pennsylvania v. Nathan Dunlap,
555 U.S. __ (2008) 18, 23

Priester v. City of Riviera Beach,
208 F.3d 919 (11th Cir. 2000) 12

Reese v. Anderson,
926 F.2d 494 (5th Cir. 1991) 23

Scott v. Harris,
127 S. Ct. 1769 (2007) 19, 21

Tennessee v. Garner,
471 U.S. 1 (1985) 16, 22

Torres-Rivera v. ONeill-Cancel,
406 F.3d 43 (1st Cir. 2005) 12, 13

Turner v. Scott,
119 F.3d 425 (6th Cir. 1997) 13

United States v. Stanchich,
550 F.2d 1294 (2nd Cir. 1977) 18

Wilson v. Arkansas,
514 U.S. 927, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995) 16

Wilson, et al. v. Meeks,
52 F.3d 1547 (10th Cir. 1995) 22, 23

Wilson Smith v. Kansas City, Missouri, et al.,
Case No. 09-1484, 586 F.3d 576, 2009 U.S. App. LEXIS 24591 (8th Cir. Nov. 9, 2009) 17

Young v. City of Killeen,
775 F.2d 1349 (5th Cir. 1985) 22, 23

Constitution

U.S. Const. amend. IV 1

Statutes

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

42 U.S.C. § 1983 ..... 2, 3, 7, 8

ARK. CODE ANN. § 20-27-2302 2

Rules

FED. R. CIV. P. 56 18

FED. R. CIV. P. 56(c)(2) 2

Other

10 C. Wright, A. Miller & M. Kane, *Federal Practice* and *Procedure* § 2712 (1983) 19

OPINIONS BELOW

The decision of the court of appeals is reported at 586 F.3d 604 and is reproduced in the Appendix herein at 1a-19a. The decision of the U.S. District Court for the Eastern District of Arkansas is not officially reported but is available at 2009 U.S. Dist. LEXIS 13009 and is reproduced in the Appendix herein at 20a-96a.

JURISDICTION

The judgment of the Eighth Circuit was issued on November 10, 2009. Appendix to Petition ("Pet. App.") 1a. Petitioners timely filed a petition for rehearing and rehearing *en banc* was denied on December 15, 2009. Pet. App. 97a. Jurisdiction for the Eight Circuit's consideration of interlocutory appeal of the District Court's denial of qualified immunity is pursuant to 28 U.S.C. § 1291. Jurisdiction before this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

Rule 56(c)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

INTRODUCTION

This case originates out of the State of Arkansas where, like other states facing similar issues, the legislature has struggled with the prevalence of imitation firearms and the difficulties they can create for public safety and for law enforcement operations. See, ARK. CODE ANN. § 20-27-2302, *et seq*. ("The Arkansas Children's Imitation Firearms Act.") (Lexis 2009). The proliferation of so called "imitation firearms" creates safety issues not only for those who carry them, but for law enforcement officers who often must make split second decisions in the field when

faced with persons carrying these guns. The unfortunate result of the use of force at issue in this case was the death of a twelve year old boy who had in his possession a toy pistol that was mistakenly identified by a police officer as a real handgun. Although this case presents one set of troubling facts, the converse is also a likely potential scenario; that is, where an officer is faced with a real gun that resembles a toy and is killed because he or she does not recognize the threat.

This case involves two officers who encountered an individual with a toy pistol that closely resembled a semi-automatic handgun. During a confrontation that lasted only a few seconds, one of the officers fired his weapon, the other did not. After a lawsuit ensued, both officers sought qualified immunity for their actions. In a decision that defies this Court's precedents, the Eighth Circuit has now held that an officer may be found liable under 42 U.S.C. § 1983 for failing to intervene to prevent another officer from committing an unconstitutional use of force, even though based on the short duration of the event, no reasonable officer would have had a realistic opportunity to intervene.

The Eighth Circuit's opinion also deviates from accepted precedent of this Court inasmuch as it denies qualified immunity to the officers involved, in part, because it determined that no warnings were given prior to the use of force at issue. Assuming *arguendo* that a warning was required in this case, even though it is undisputed that the words "get on the ground, drop the gun" were spoken by the officers at the scene, the Eighth Circuit nevertheless held that no "warnings" were given." Because there is no clearly

established law that would put reasonable officers on notice that they have a constitutional duty to identify themselves as police prior to utilizing deadly force when faced with an apparent imminent danger, the Eighth Circuit deviates from this Court's precedents in denying these officers qualified immunity. The resolution of this issue is important to provide clarity in the law necessary for orderly and effective law enforcement.

Another important issue raised by the Eighth Circuit's opinion concerns a procedural issue that is at the heart of this Court's jurisprudence on pretrial qualified immunity practice. The general rule is that when an appellate court reviews the denial of qualified immunity at the summary judgment stage, the court should view all facts in the light most favorable to the non-moving party. See *Johnson v. Jones*, 515 U.S. 304, 311-312 (1995). The Eighth's Circuit ruling here broadens the application of this rule and holds that a party opposing an officer's assertion of qualified immunity may simply take one position on the facts early in a case, only to later contradict himself and thereby avoid summary judgment. Lower courts considering qualified immunity issues at the summary judgment stage should not be so constrained in analyzing the record before them that they are forced not only to construe the facts in favor of the non-moving party, but also to choose the most favorable version of a party's contradictory testimony. This Court should grant *certiorari* and hear this issue in order to ensure that the doctrine of qualified immunity is not reduced simply to a defense that for practical purposes is only applicable at trial.

STATEMENT OF THE CASE

A. Factual Background

On June 22, 2007 Officers Sammis and Evans were on duty as police officers conducting surveillance from an unmarked vehicle in an apartment complex parking lot. The officers were part of a special response team that had received a tip that a nearby convenience store would be robbed that night by two or three black males. Pet. App. 3a. At approximately 10:00 p.m. the officers saw two black males walking in the direction of the officers' vehicle, one of whom was apparently armed. It was later learned that the two individuals walking toward the officers were DeAunta Farrow, who was 12 years old, and Unseld Nance, Jr., who was 14 years old. Farrow was on the officers' left; Nance was on the officers' right. Pet. App. 4a.

As Farrow walked toward them, both officers observed what they believed was a handgun. Both officers exited their vehicle to confront Farrow and Nance. With Sammis on the left and Evans on the right, the officers approached Farrow and Nance. The officers, confronting at least one apparently armed individual, had their weapons drawn for their protection and the protection of any other person who might be in the vicinity. Pet. App. 4a.

Sammis moved toward Farrow, who was on his side. Evans moved toward Nance, who was on his side. As the officers approached, Sammis gave the commands "drop the gun, get on the ground." At that point Nance immediately got to the ground but Farrow did not. Sammis repeated the warning, but Farrow

remained standing despite Sammis' repeated commands and Nance's compliance.

Farrow then began raising the hand in which the officers believed he was holding a handgun. Because Farrow failed to comply with Sammis' orders and was in the possession of what the officers reasonably believed was a handgun, at that point Sammis felt threatened and in fear for his life. Sammis then yelled "no" and fired two rounds in rapid succession toward Farrow. At the time Farrow was shot, Nance was not looking at Farrow but was lying face down and looking forward. Both shots hit Farrow, ultimately proving to be fatal. The toy gun recovered from the scene is a replica of a semi-automatic handgun that the Plaintiffs have conceded resembles a real handgun. The time period from the point the final warning was given to the final shot being fired was only a few seconds.

Later that night Nance, accompanied by his father, was interviewed by Mike Middleton of the Arkansas State Police. A video recording of the interview was made. After the interview Nance and his father voluntarily reviewed and signed a statement regarding the shooting. Both the video of the interview and the written statement signed by Unseld Nance and his father unequivocally confirm that at the time of the shooting, Farrow had the toy pistol in his right hand. During the interview, Nance demonstrated this fact by standing and positioning his arms and hands in a manner that demonstrated to the investigator how Farrow was standing and indicating that Farrow had a toy gun in his right hand, and that his right hand was partially raised when he was shot. Although the interview and statement were not sworn, during his deposition taken some months later Nance reviewed

his statement, watched the video, and confirmed under oath that he gave the statements contained therein.

Nance and his father also confirmed in their depositions that they were not threatened or coerced into giving the statement the night of the shooting and that the interview and written statements were given voluntarily. Nevertheless, in an apparent effort to manufacture a fact issue so that their case would not be dismissed prior to trial, Unseld Nance answered a final, leading question from his attorney at the close of his deposition wherein he stated that at the time of the shooting the gun was in Farrow's waistband. It is this piece of evidence alone that prevented both the District Court and the Circuit Court from finding that both officers were entitled to qualified immunity. Pet. App. 12a and 45a-46a.

B. Procedural History

The case at bar is a consolidated case that began when Plaintiffs Unseld Nance, Sr. and Pamela Farrow, individually and on behalf of their minor son, Unseld Nance, Jr. ("Nance"), filed a complaint in the district court on September 4, 2007 alleging, *inter alia*, violations of First, Fourth, Eighth and Fourteenth Amendment Rights, pursuant to 42 U.S.C. §1983. Thereafter, Plaintiffs Debra Farrow and Robin Perkins filed a complaint in the district court on December 10, 2007 on similar bases, individually, and in a representative capacity on behalf of estate of their deceased son, DeAunta Farrow ("Farrow"). On August 28, 2008 Appellants filed Motions for Summary Judgment asserting qualified immunity with regard to the Nance claims and on December 19, 2008 Appellants filed similar motions with regard to the

Farrow claims. On February 5, 2009 the district court entered an order denying the qualified immunity motions filed relative to both the Farrow and Nance claims. An interlocutory appeal was taken to the Eighth Circuit Court of Appeals with regard to the denial of the motions for summary judgment based on the defense of qualified immunity. The judgment of the court of appeals affirming the district court was issued on November 10, 2009. Pet. App. 1a. Petitioners' timely filed petition for rehearing and rehearing *en banc* was denied on December 15, 2009. Pet. App. 97a. The instant Petition is filed on behalf of defendants Jimmy Evans and Erik Sammis.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW REGARDING THE FAILURE TO INTERVENE CLAIM CONFLICTS WITH *GRAHAM V. CONNOR* AND THE DECISIONS OF OTHER CIRCUIT COURTS.

The first question presented here pertains to the analysis of the qualified immunity defense asserted by Evans in response to the failure to intervene claim under 42 U.S.C. § 1983. The Eighth Circuit's opinion deviates from this Court's holding in *Graham v. Connor*, 490 U.S. 386 (1989) and creates a new rule of law whereby an officer can be held liable simply for witnessing the unconstitutional behavior of another officer. The rule announced by the Eighth Circuit will greatly hamper the ability of law enforcement to effectively function. Indeed, the decision below burdens officers engaged in a rapidly developing situation with analyzing not only whether their actions

are constitutionally justifiable, but also whether the actions of other officers on the scene are likewise constitutional. A rule requiring an officer to intercede in the context of an incident that lasted no more than a few seconds is wholly unworkable for officers in the field. The Eighth Circuit's decision likewise departs from the decisions of other federal circuits that have held that in similar situations where the use of force in this case was over in a matter of seconds and there was no realistic opportunity to intercede, the officer witnessing the use of force owes not duty to intervene.

The material facts stated most favorably to the plaintiffs, as they pertain specifically to a consideration of whether the defendant Evans is entitled to qualified immunity on the failure to intercede claim, are as follows: Evans and Sammis were sitting in an unmarked police vehicle at approximately 10:00 p.m. and saw Farrow and Nance walking toward them. According to plaintiff Nance's most recent account of the events, which the Eighth Circuit assumed for purposes of addressing the qualified immunity issue, Farrow had a toy gun, that closely resembled a real gun, tucked in his waistband.[1] The officers then exited the vehicle. Sammis shouted "get on the ground, drop the gun." Nance got on the ground, Farrow remained standing. Sammis repeated the commands "get on the ground, drop the gun." Farrow remained standing, Sammis yelled "no" and then fired his weapon two times in rapid succession. Based on this version of the facts, it is without

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[1] As discussed at length later in the Petition, Nance's statement given the night of the shooting plainly states that at the time of the shooting Farrow was holding the gun in his right hand.

question that Evans did not have a realistic opportunity to stop Sammis from shooting.

It should be noted that the Eighth Circuit correctly held that the officers in this case committed no constitutional violation in initially confronting Farrow and Nance and for the initial detention prior to the shooting. As such neither officer can be liable for what took place prior to the first shot being fired. Therefore, with regard to Sammis, the only constitutionally suspect conduct to be addressed concerns the actual shooting because that is when the constitutional deprivation, if any, occurred. Sammis fired shots in this case, and as it relates to him, the Eighth Circuit has correctly ruled that this was the only potential constitutional violation committed by him. Sammis' potential violation resulted from two rapidly fired bullets.

With regard to Officer Evans, the Eighth Circuit held that the only possible constitutional violation is his failure to intervene to prevent the use of force by Sammis. Stated differently, the only conceivable question left for trial pertaining to Evans is whether can be held liable for failing to take action to prevent Sammis from firing the shots. The Eighth Circuit should have then analyzed whether Evans, who was present but did not directly participate in the shooting, acted in an objectively reasonable manner and was therefore entitled to qualified immunity. That is, assuming *arguendo* that Sammis' actions were unconstitutional, were Evans' actions at the time of the shooting objectively reasonable? Instead, the Eighth Circuit held that "[t]he claims against Evans are based not on the use of excessive force but also [sic] the failure to prevent its use" but did so without

engaging in any analysis whatsoever of whether Evans' actions were objectively reasonable. Pet. App. 14a.

The Eighth Circuit opinion deviates from rulings by other circuit courts that have held that a failure to intercede claim cannot lie where due to the short period of time between the commencement on the unconstitutional use of force and the cessation thereof does not allow a realistic opportunity to intervene. The Second Circuit has recognized that in a case involving an officer facing a claim for failing to intervene to prevent the unconstitutional beating of an arrestee, the episode must have been of such a duration that the non-intervening office could be viewed as a "tacit collaborator":

> Even when the evidence is viewed in the light most favorable to the plaintiff, there is insufficient evidence to permit a jury reasonably to conclude that Conners failure to intercede was a proximate cause of the beating. The three blows were struck in such rapid succession that Conners had no realistic opportunity to attempt to prevent them. This was not an episode of sufficient duration to support a conclusion that an officer who stood by without trying to assist the victim became a tacit collaborator.

O'Neill v. Krzeminski, 839 F.2d 9, 11 (2nd Cir. 1988). Although *O'Neill* predates *Graham v. Connor*, the analysis set forth therein is nevertheless in accord the constitutional standard of objective reasonableness.

Circuit courts addressing qualified immunity in the context of a failure to intercede claim have required

that before such a claim can go forward, there must have been sufficient time to allow the officer a realistic opportunity to take action. The rationale is that without a sufficient interval of time, the officer owes the subject no duty to protect. *Krout v. Goemmer*, 583 F.3d 557, 565 (8th Cir. 2009) ("This duty of a police officer to intervene to prevent the excessive use of force -- where the officer is aware of the abuse and the duration of the episode is sufficient to permit an inference of tacit collaboration") (citing *Torres-Rivera v. ONeill-Cancel*, 406 F.3d 43, 51-52 (1st Cir. 2005)); *Priester v. City of Riviera Beach*, 208 F.3d 919, 924-25 (11th Cir. 2000); *Ensley v. Soper*, 142 F.3d 1402, 1407 (11th Cir. 1998); *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996); *Gaudreault v. Municipality of Salem*, 923 F.2d 203, 207 n.3 (1st Cir. 1990) (*per curiam*); *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir. 1988); *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir. 1982)(per curiam). The Eighth Circuit opinion ignores this element as it pertains to Evans' assertion of qualified immunity inasmuch as it is true that given the undisputed short interval of time involved, Evans simply did not have a realistic opportunity to intervene and his conduct was therefore objectively reasonable. Indeed, just as the officer in *Krzeminski* did not have a realistic opportunity to intervene between the three punches thrown, Evans did not have a realistic opportunity to intervene between the two shots that were fired.

Time is a key element for establishing a duty to act on the part of the officer. As the First Circuit in *Torres-Rivera v. ONeill-Cancel* explained what it viewed to be the "classic paradigm" for a failure to intervene claim:

> the classic paradigm of police failure to stop the excessive use of force by a fellow officer, which we addressed in *Gaudreault v. Municipality of Salem*, 923 F.2d 203 (1st Cir. 1990). The plaintiff there sued four police officers who did not actively participate in another unidentified officers assault on the plaintiff under detention. *Id.* at 207. The court explained that "an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officers excessive force can be held liable under section 1983 for his nonfeasance." *Id.* at 207 n.3. No liability for the non-participating bystander officers existed there because "the attack came quickly and was over in a matter of seconds," giving the officers no "realistic opportunity to prevent an attack." *Id.* (citing *ONeill v. Krzeminski*, 839 F.2d 9, 11-12 (2d Cir. 1988)).

Torres-Rivera, 406 F.3d at 52 (emphasis added). Similarly, the test adopted by the Sixth Circuit and relied upon by the Eighth Circuit in this case imposes liability only "where '(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring.'" *Floyd v. City of Detroit*, 518 F.3d 398, 406 (6th Cir. 2008) (quoting *Turner v. Scott*, 119 F.3d 425 (6th Cir. 1997). Although the Eighth Circuit panel relied on *Floyd*, its ruling eviscerates the second prong of the *Floyd* analysis. The two part analysis in *Floyd* is merely shorthand for the ultimate analysis of whether the Fourth Amendment reasonableness analysis set forth in *Graham v. Conner* has been satisfied. *Floyd*, 518 F.3d at 406 (citing *Graham*, 490 U.S. at 395). As

such, in abandoning the second prong of the *Floyd* test, the Eighth Circuit likewise abandons the objective reasonableness standard set forth in *Graham*.

Applying the rule of law relied upon in *Floyd* against the background of the objective reasonableness standard set forth in *Graham* to the undisputed facts here clearly demonstrates that no reasonable juror could find the Plaintiffs' constitutional rights were violated by Officer Evans due to a failure to intervene. Even assuming *arguendo* there were facts showing Evans knew or should have known that it was likely that excessive force was going to be employed, thereby satisfying the first prong of the *Floyd* test, given that the shots were fired in rapid succession a reasonable officer in Evans' position would not have had the opportunity or the means to prevent the use of force by Sammis and the second prong cannot be satisfied. Because it is without dispute that the interval of time between the two shots fired was so short that no reasonable jury could find that Evans had a realistic opportunity to intervene, Evans should be granted qualified immunity and dismissed from this case.

II. CERTIORARI IS WARRANTED BECAUSE THE EIGHTH CIRCUIT'S DETERMINATION THAT THE COMMANDS "GET ON THE GROUND, DROP THE GUN" WERE NOT SUFFICIENT TO SATISFY THE CONSTITUTIONAL STANDARD FOR A WARNING GIVEN PRIOR TO THE USE OF DEADLY FORCE IS IN DIRECT CONFLICT IN *TENNESSEE V. GARNER* AND CREATES A SPLIT OF AUTHORITY IN THE CIRCUIT COURTS.

Although the Eighth Circuit acknowledged that there was no dispute that the words "get on the ground, drop the gun" were uttered by Sammis, App. 4a, it nevertheless held that a genuine issue of material fact existed as to whether a "warning" was given. Pet. App. 11a. The Eighth Circuit panel also held that whether the officers announced their identity as "police" was a material fact in dispute and therefore a necessary element of the warning that prevents a ruling in their favor on qualified immunity. In so holding, the Eighth Circuit created a new constitutional standard whereby a police officer faced with a perceived threat is required to give a warning, which must include announcing his or her identity as a police officer, before utilizing deadly force to protect himself or those around him.

As recognized by the Seventh Circuit, although "the Supreme Court has held that police officers usually must announce their identity before carrying out an arrest in a private dwelling," there is no clearly established law that establishes a constitutional duty to identify themselves as police during a public arrest. *Catlin v. City of Wheaton, et al.*, 574 F.3d 361, 369 (7th

Cir. 2009) ("we are aware of no court of appeals decision that has recognized a constitutional obligation on the part of the police to announce their identity when they carry out an arrest in a public place") (citing *Wilson v. Arkansas*, 514 U.S. 927, 934, 115 S. Ct. 1914, 131 L. Ed. 2d 976 (1995) (holding that the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry)). Because it is either not constitutionally required, or because such a requirement was not clearly established at the time of the incident, the issue of whether the officers in the present case said "police" is immaterial to the analysis of whether the officers are entitled to qualified immunity. Accordingly, the fact that this issue is disputed by the parties has no bearing on whether Sammis' actions were unconstitutional, and even if we assume for purposes of this analysis that officers did not identify themselves as police during this event, the officers actions were nevertheless met the standard of objective reasonableness. See *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (petitioner may claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the standard of objective legal reasonableness).

Moreover, even if a warning were required, which Petitioners dispute, Nance's statement the night of the shooting was that "[t]hey told us to get on the ground. They told him to put the gun down." Such words are sufficient to convey a warning inasmuch as a panel of the Eighth Circuit has found that a warning simply to "freeze" is sufficient to satisfy the *Tennessee v. Garner*, 471 U.S. 1 (1985), requirement, even where such warning was not given in the moments immediately

preceding the use of force. *Krueger v. Fuhr*, 991 F.2d 435, 440 (8th Cir. 1993) ("the absence of a warning immediately preceding the shooting does not render his use of deadly force constitutionally unreasonable"). Indeed, the Eighth Circuit acknowledged as much in that it recently denied qualified immunity to an officer on an excessive force claim because the "[p]laintiff never resisted [the officer's] commands and had no opportunity to comply . . . ." *Wilson Smith v. Kansas City, Missouri, et al.*, No. 09-1484, 586 F.3d 576, 2009 U.S. App. LEXIS 24591, *10 (8th Cir. Nov. 9, 2009). Indeed, although not a deadly force case, *Wilson Smith* is notable in that it is premised on the fact that there was no warning whatsoever prior to the use of force at issue in that case. *Id.* In the case at bar, it is without question that commands were given, that Farrow did not comply, and that Farrow had the opportunity to comply—as evidenced by the fact that Nance, who was standing next to him and received the identical commands, did in fact comply. As such, because in the present case warnings were given and Farrow had the opportunity to comply but indisputably did not, Sammis and Evans are entitled to qualified immunity.

III. THE EIGHTH CIRCUIT'S ERRONEOUS RULING THAT THE PLAINTIFF'S DEPOSITION TESTIMONY, WHICH CONTRADICTS HIS OWN EARLIER VIDEOTAPED AND WRITTEN STATEMENT, WAS SUFFICIENT TO CREATE A FACT QUESTION AND PREVENT A SUMMARY JUDGMENT RULING IN FAVOR OF THE DEFENDANTS ON THE BASIS OF QUALIFIED IMMUNITY VIOLATES THIS COURT'S HOLDING IN *SCOTT V. HARRIS*.

It is indeed a bedrock principal in pretrial qualified immunity practice that a court may not grant qualified immunity where there are disputed issues of facts that are material to the determination of whether the officers' actions were objectively reasonable. This case tests the limits of this principal. Notwithstanding this prohibition against fact finding by a court considering a motion for summary judgment, a trial judge hearing a qualified immunity motion need not dispense with a common sense assessment of the testimony, indeed, "judges are not required to exhibit a naivete' from which ordinary citizens are free." *Pennsylvania v. Nathan Dunlap*, 555 U.S. ___ (2008) (Justice Roberts dissenting from a denial of a petition for writ of certiorari, quoting Justice Friendly in *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977)). Likewise Rule 56 of the Federal Rules of Civil Procedure requires that any issue of fact that may preclude summary likewise be "genuine." FED. R. CIV. P. 56. As such, the trial judge has some ability to determine the veracity of the competing proof and is not held to reject out of hand any motion for summary judgment merely because there is some variance in the

parties' account of the material facts. See *Johnson v. Jones*, 515 U.S. 304, 308 (1995). The reviewing court need accept a party's obvious attempt to assert a manufactured issued of fact. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007); see, *Halperin v. Abacus Tech. Corp.*, 128 F.3d 191, 198 (4th Cir. 1984) (a genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiffs testimony is correct). This Court has stated that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.* Indeed, the very purpose of summary judgment under Rule 56 is to prevent "the assertion of unfounded claims or the interposition of specious denials or sham defenses." *Martin v. Merrell Dow Pharms., Inc.*, 851 F.2d 703 (3rd Cir. 1998) (citing 10 C. Wright, A. Miller & M. Kane, *Federal Practice* and *Procedure* § 2712 (1983)). A party should not be permitted avoid summary judgment simply by contradicting his own earlier testimony.

A review of the record in this case reveals that there is no *genuine* dispute regarding the *material* facts with respect to the qualified immunity analysis. Indeed, the case at bar, the facts demonstrating an effort to manufacture a fact issue are even more egregious than in *Scott* —here the plaintiff's testimony not only contradicts the overwhelming record before the Court, but more strikingly contradicts his own testimony. Unseld Nance, Jr. is a plaintiff in this consolidated case by virtue of his appearance in this case via his parents as his legal guardians. The night of the shooting Nance repeatedly and consistently told

the state police that Farrow had a toy gun in his right hand at the time of the shooting. Nance states that although Farrow was carrying the gun under his shirt as they walked, prior to the shooting, the gun was in Farrow's hand, facing down:

> Officer #1: But when these – these men gave you all a command to get on the ground and they also gave a command for [Farrow] to do what with the gun?
>
> Nance: Put it on the ground. And he had his hands up like this and the gun was pointed down.
>
> Officer #1: So he had the gun in his right hand?
>
> Nance: Right hand.

Court of Appeals Appendix ("A") 804-80. On the night of the shooting and following the interview, Nance and his father also signed a written statement prepared by the Arkansas State Police investigator during the interview. Nance's deposition was taken eleven months later. Although this written statement given the night of the shooting was not sworn, Nance confirmed its accuracy under oath during his deposition. A. 804-805.

Under questioning by defense counsel in his deposition, Nance confirms under oath that the statement accurately reflects what he told the state police the night of the shooting. During the deposition Nance also viewed the video footage of his state police interview and further confirms the statement he made therein. Nance likewise professed to his lawyer and defense counsel in his deposition that he told the state

police investigator that Farrow held the gun in his right hand. At this point, the statements of Sammis and Evans regarding the location of the toy pistol at the time of the shooting (i.e. in Farrow's right hand) were in complete agreement with Nance's version of events. Had Nance's attorney declined to question his own client and the deposition ended at that moment, there would be absolutely no dispute on this fact. Only when Nance is fed a leading question by his attorney at the end of his deposition does he give any testimony contrary to this assertion.

Given the circumstances of Nance's prior statement, which given to the Arkansas State Police freely and without coercion, with his father present, and considering that Nance's later deposition testimony contradicting the prior statement was made under his own lawyer's questioning, it is apparent that the later story was created to avoid a dismissal of the case. The only possible question as to whether Farrow held a toy gun in his hand and raised it toward Sammis is the statement made by Nance, blatantly contradicting his own previous testimony. The Court should view the facts in the light depicted by the video recording of Nance's interview. *Scott v. Harris*, 127 S. Ct. at 1776. As seen and heard in the video, Nance confirms that Farrow had the toy gun in his right hand at the time of the shooting and Nance likewise demonstrates to the investigators how Farrow was standing at the time he was shot – with his right hand partially raised, holding the toy pistol. A. 411-412.

Despite the references made in its opinion that it is restrained from considering any disputed fact or engaging in any fact-finding, the Eighth Circuit itself engages in its own version of fact finding in this case

inasmuch as the statement of the facts in its opinion completely disregards and fails to even mention the earlier statement of Nance. Indeed, the Eighth Circuit panel, operating under the apparent justification of considering the matter in a light most favorable to the non-moving party, chose between the two versions of Nance's account of the event. The opinion states that "according to Nance . . . . Farrow had a toy gun tucked into the waistband of his pants" and simply ignores the undisputed fact that Unseld Nance, Jr. had previously given a statement, confirmed under oath at his deposition, that Farrow had the toy gun in his right hand, partially raised, at the time of the shooting. App. 4a. Even though the appellate court must make qualified immunity determinations at the summary judgment stage taking the record in the light most favorable to the party asserting the injury, such a rule of law does not suggest that the court must choose between one of several versions of the party's story over another.

Moreover, regardless of whether there is a genuine dispute as to the location of the gun at the moment of the shooting (i.e. in Farrow's hand or his waistband), the officers had an objectively reasonable fear for their safety, given that a reasonable officer confronted with the same circumstances would have believed that Farrow was armed and that Farrow posed an immediate threat, given that Farrow did not comply with their commands. This Court has explicitly declared that the use of deadly force is permissible when "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (quoted by *Hernandez v. Jarman*, 340 F.3d 617, 622 (2003)). Although there

may be some factual wrinkles present, as any similar case would have, "the core fact pattern is the same": experienced police officers confronted with an armed subject who is ignoring their commands. See, *Dunlap*, 555 U.S. __ (Roberts dissenting).

The Eighth Circuit opinion suggests that for the officers here to be entitled to qualified immunity the weapon in question needed to have been in Farrow's hand pointed at the officers. Conversely, other circuits have rejected the requirement that in order for an officer to use deadly force, the suspect had to be pointing the gun at the officer. *Wilson, et al. v. Meeks*, 52 F.3d 1547, 1553 (10th Cir. 1995). The Fifth Circuit has found reasonable the use of deadly force where officers had not even seen a weapon. *Reese v. Anderson*, 926 F.2d 494 (5th Cir. 1991); *Young v. City of Killeen*, 775 F.2d 1349 (5th Cir. 1985)). Indeed, the Eighth Circuit has indicated that even a perception that the suspect is reaching for a weapon may justify the use of deadly force. *Ngo v. Storlie*, 495 F.3d 597, 605 (8th Cir. 2007).

Finally, in an apparent attempt to bolster the finding that a material issue of fact exists, the Eighth Circuit opinion also references a report by the deputy coroner wherein he found it "unlikely that Farrow was raising both arms at the time he was shot, based on the trajectory of the bullet wounds on his body." Pet. App. 12a. This fact is completely irrelevant to the analysis of whether the gun was in Farrow's right hand at the time of the shooting. Konzelman's report only puts in dispute the relative position of Farrow's right arm at the time of the shooting and does nothing to dispute whether the gun was in his right hand at the time of the shooting. Indeed, both parties agree

that Farrow's arm was somewhere between at his side and raised at the time of the shooting. In either event, both the District Court and the Circuit Court have held that should it be determined that the gun was in Farrow's hand at the time of the shooting, the officers would be entitled to qualified immunity. Furthermore, it is clear that when considering the uncontroverted facts before the Court, without the benefit of hindsight (i.e. without the benefit of knowing that it was a toy gun), both officers' actions were objectively reasonable. As often quoted from *Graham v. Connor*, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, at 396. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Id.* at 397-397.

This case, which involves the mistaken belief that Farrow was carrying a weapon, as opposed to a toy gun, vividly demonstrates the importance of the rule prohibiting hindsight analysis. Only with the benefit of hindsight would be reasonable to conclude that the officers here were never in apparent danger and therefore no use of force could ever be deemed objectively reasonable. The obvious flaw in such an analysis is that the gun here indisputably appeared to be real and therefore an *apparent* danger existed; as such, there is no question that the officers were reasonable in assuming that it was real. Indeed, given that it is patently clear that the toy pistol in this case could quite reasonably been mistaken for a real gun, in

order to ensure that the analysis does not include the benefit of hindsight, the Eighth Circuit should have analyzed the qualified immunity issues the assumption that the officers faced a suspect armed with a real gun.

CONCLUSION

Based upon the arguments and authorities set forth herein, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A: Opinion/Judgment, United States Court of Appeals for the Eighth Circuit, filed November 10, 2009 ..... 1a

Appendix B: Order, United States District Court Eastern District of Arkansas, filed February 5, 2009 ..... 20a

Appendix C: Order, United States Court of Appeals for the Eighth Circuit, filed December 15, 2009 ..... 97a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 09-1353

[Filed November 10, 2009]

Unseld Nance, Sr., individually and as the natural father and next friend of Unseld Nance, Jr.; Pamela Farrow,	)
Plaintiffs - Appellees,	)
v.	)
Erik Sammis, individually; Jimmy Evans, individually; William Johnson, individually; Robert Paudert, individually,	)
Defendants - Appellants,	)
City of West Memphis, Arkansas; Unknown Arkansas State Police Officers, in their official capacity,	)
Defendants.	)
Deborah Farrow, individually and as co-administrator of the Estate of DeAunta Farrow; Robin Perkins,	)

individually and as co-administrator of the Estate of DeAunta Farrow,

Plaintiffs - Appellees,

v.

Erik Sammis, individually and in official capacity as Officer of West Memphis Police Department; Jimmy Evans, individually; William Johnson, individually; Robert Paudert, individually,

Defendants - Appellants,

City of West Memphis, Arkansas,

Defendant.

Appeal from the United States District court for the Eastern District of Arkansas.

Submitted: September 22, 2009
Filed: November 10, 2009

Before MURPHY, JOHN R. GIBSON, and RILEY, Circuit Judges.

MURPHY, Circuit Judge.

This case arises from the fatal shooting of DeAunta Farrow and seizure of Unseld Nance by two police officers in West Memphis, Arkansas. The families of

Farrow and Nance brought this action under 42 U.S.C. § 1983 and state law against the two officers, as well as the chief of police, the mayor, and the city, alleging in particular excessive force and unreasonable seizure in violation of the Fourth Amendment. The district court[1] denied summary judgment to the officers on the basis of qualified immunity, but granted the summary judgment motions of the chief of police, the mayor, and the city. The officers appeal, and we affirm.

I.

The West Memphis police department received information that after dark on June 22, 2007, two or three black males were going to rob a particular convenience store. Seven members of the Special Response Team, including defendant officers Erik Sammis and Jimmy Evans, were ordered to conduct surveillance in the area of the convenience store. Four were stationed in a vehicle one block south of the store, another was positioned across the street from the store, and officers Sammis and Evans were located about two blocks to the north.

Officers Sammis and Evans were parked in a dark gray, unmarked pickup truck in the parking lot of an apartment complex. They were wearing camouflage pants, dark grey shirts, and black bulletproof vests. The backs of their vests had the word "POLICE" written on them. It was already dark, and the area surrounding the apartment complex was poorly lit. At about 10:00 p.m. the officers noticed two black males,

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[1] The Honorable Brian S. Miller, United States District Judge for the Eastern District of Arkansas.

later identified as twelve year old DeAunta Farrow and fourteen year old Unseld Nance, walking toward the apartment complex. Farrow was on the officers' right; Nance was on their left.

The parties disagree as to what happened next. According to Nance, he and Farrow were walking to the apartment building to retrieve his cell phone. Farrow had a toy gun tucked into the waistband of his pants. The gun was gray with a black handle, and it had an orange cap at the tip of the barrel. As the two boys neared the apartment building, they saw two men get out of a dark pickup truck. The men pointed flashlights and guns at them and one shouted , "Get on the ground and drop the gun." Nance immediately dropped to the ground, but Farrow remained standing. Nance says the men did not identify themselves as police, nor did they have a visible badge or patch to signify that they were law enforcement officers. The next thing he heard was a gunshot. He contends that Farrow was shot while "fixing to get on the ground" and while the toy gun was still tucked into his waistband. Nance does not recall hearing any warnings from the men before the shooting.

Officers Sammis and Evans report that as the boys approached, they saw something in Farrow's right hand that appeared to be a handgun. They got out of their truck with their guns drawn and flashlights on. Sammis claims that he shouted, "Police!" and ordered Farrow to drop his gun. Although Nance hit the ground immediately, both officers say Farrow remained standing and did not drop his weapon despite repeated commands to do so and that he raised his right hand while still holding the gun. Sammis

then fired two rounds in rapid succession. Two shots hit Farrow.

Sammis told Evans to handcuff Nance while he bent over Farrow who was lying face down on the parking lot. Sammis says he asked Farrow if he had been hit and that he responded, "Yeah. It's only a toy gun." Sammis rolled Farrow to his side and found the toy gun underneath him at waist level. Appellees contend that it was still tucked into Farrow's waistband.

Evans contacted headquarters to report the shooting and the injuries to Farrow. The other members of the surveillance team hurried to the scene, and Evans relinquished control of Nance to the other officers. Sammis and Evans contend that they had custody of Nance for no more than 10 minutes and that he was still handcuffed when they turned him over. Nance asserts that he was handcuffed for almost 30 minutes at the scene of the shooting and while being transported to the police station. Paramedics attempted to stabilize Farrow once they arrived, but their efforts were unsuccessful and he died at the scene.

An Arkansas state police officer conducted a videotaped interview of Nance less than three hours after the shooting. During the interview, Nance stated that he and Farrow had been walking to their cousin's apartment when "two people got out of the car and pointed guns." They told Farrow and him to get on the ground and "to put the gun down." Nance reported that the two men did not identify themselves and that he had initially thought "they was people playing." Nance later stated that it had occurred to him that the

men might be police officers because of how they shouted, but he repeatedly said that the men did not identify themselves and that he had not seen any police badge or patch on their clothing.

When asked about the gun, Nance demonstrated to the state police officer how Farrow had had the barrel of the toy gun tucked into his waistband while they walked to the apartment building. Nance reported that Farrow had been covering the handle of the gun with his right hand and that he never removed the gun from his waistband during their walk. Nance also showed the officer how Farrow had raised his hands up after they were ordered to get on the ground. It was unclear from his oral statement and demonstration whether Nance meant that Farrow had the gun in his hand at that point or whether it remained in his waistband.

At the conclusion of the interview, the state police officer drafted a summary statement for Nance to sign. It states in relevant part:

> De[A]unta was carrying with his right hand as we walked it was under his shirt with the handle showing. We saw 2 men get out of a black pickup truck by a dumpster they had two flashlights. Then one of them said get on the ground. I got on the ground De[A]unta was standing. His arms were partially raised up with the toy gun in his right hand. I was looking straight and didn't see the men. They said drop the gun. De[A]unta was fixing to get on the ground when they shot.

During his deposition, however, Nance testified that Farrow had still had the toy gun "tucked in his pants" at the time officer Sammis fired his weapon.

The medical examiner assigned to the case, Dr. Daniel Konzelman, testified that based upon the trajectory of the bullet wounds in Farrow's body, it was unlikely he had had both hands raised at the time he was shot. Dr. Konzelman also stated that the trajectory indicated that Farrow's left arm was not raised but that he could not determine the position of Farrow's right arm.

Nance's parents filed their action in the federal district court, individually and on behalf of their son, against officers Sammis and Evans, the chief of police, the mayor, and the city. They alleged violations of the First, Fourth, and Fourteenth Amendments, as well as various state law claims. Thereafter, Farrow's parents brought their action, individually and on behalf of the estate of their deceased son, against the same defendants alleging violations of the Fourth and Fourteenth Amendments and state law. The two cases were consolidated. All defendants moved for summary judgment with the individual defendants seeking qualified immunity.

The district court analyzed the excessive force and unreasonable seizure claims against officers Sammis and Evans under the Fourth Amendment, concluding that appellees had presented sufficient evidence for a reasonable jury to determine that the officers' actions violated clearly established constitutional rights of Nance and Farrow. The court determined that the pretrial record contained genuine issues of material fact as to "whether Farrow held a toy gun in his hand

that could be mistaken for a real gun and [whether he] raised it toward Sammis, or if the toy gun was 'tucked in' Farrow's pants at the time Sammis fired his weapon." The district court concluded that these questions precluded qualified immunity on appellees' claims arising from the shooting. The officers now appeal those decisions.

The court concluded that the two officers could not however be held liable for the prolonged detention of Nance after he was turned over to others at the scene of the shooting. The court noted that, "[a]lthough the continued detention of Nance appears to have been unnecessary and unwarranted, plaintiffs have failed to name any individual responsible for the detention." The court granted qualified immunity to Sammis and Evans as to the continued detention and that has not been appealed.

Finding no basis for municipal liability, the district court granted summary judgment to the city. The court also granted summary judgment to the chief of police and the mayor on the § 1983 claims, concluding that appellees provided insufficient evidence to support a finding of supervisor liability. The chief of police and the mayor filed a petition to appeal if the district court's order were interpreted to permit any state law claims to survive against them, but no appeal was taken with respect to them.[2]

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[2] The chief of police and the mayor worry that the district court's order would permit appellees to pursue state law claims against them. We believe this is an inaccurate reading of the order. Appellees have not made any factual allegations in their complaints, during summary judgment, or on appeal to suggest that they are pursuing state law claims against the mayor or the

II.

Qualified immunity protects government officials from liability under § 1983 when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Hope v. Pelzer, 536 U.S. 730, 739 (2002). The test for whether an officer is entitled to qualified immunity is twofold: (1) whether the facts alleged, taken in the light most favorable to the injured party, show that the officer's conduct violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the deprivation so that a reasonable officer would understand his conduct was unlawful. Pearson v. Callahan, 129 S. Ct. 808, 815-16 (2009); Henderson v. Munn, 439 F.3d 497, 501-02 (8th Cir. 2006). If no reasonable factfinder could answer yes to both of these questions, the officer is entitled to qualified immunity. See Plemmons v. Roberts, 439 F.3d 818, 822 (8th Cir. 2006).

We review a district court's denial of qualified immunity de novo, viewing the facts in the light most favorable to the nonmoving parties and drawing all reasonable inferences in their favor. Cavataio v. City of Bella Villa, 570 F.3d 1015, 1019 (8th Cir. 2009). Denial of qualified immunity will be affirmed if "a genuine issue of material fact exists as to whether a reasonable officer could have believed his actions to be

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chief of police. The only claims raised against them were under § 1983, and the district court granted summary judgment on them. Based on the record we conclude that the chief of police and the mayor were properly dismissed.

lawful." Craighead, 399 F.3d at 960. We are prohibited from weighing evidence or making credibility determinations at this stage. Tlamka v. Serrell, 244 F.3d 628, 634 (8th Cir. 2001).

We first address officer Sammis' claim for qualified immunity with respect to appellees' excessive force and unreasonable seizure claims. All claims that law enforcement officers have used excessive force, whether deadly or not, in the course of an arrest, investigatory stop, or other seizure are analyzed under the Fourth Amendment's objective reasonableness standard. Graham v. Connor, 490 U.S. 386, 388 (1980). The key question is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." Craighead, 399 F.3d at 961. The reasonableness of an officer's use of force is evaluated by looking at the totality of the circumstances, including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade by flight." Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009).

"Apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." Hassan v. City of Minneapolis, 489 F.3d 914, 919 (8th Cir. 2007). The use of deadly force is not constitutionally unreasonable if an officer has "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." Moore, 514 F.3d at 762. But where the suspect "poses no immediate threat to the officer and no threat to others, the harm resulting

from failing to apprehend him does not justify the use of deadly force to do so" Craighead, 399 F.3d at 961.

Because a reasonableness review of the officers' conduct requires an examination of the sequence of events surrounding the shooting, we begin our analysis by examining the facts in the record. All parties agree that Nance immediately got to the ground when Sammis shouted his order and that Farrow remained standing. The issues of disputed fact include whether the officers identified themselves as police, whether they saw Farrow with a gun in his hand, whether they had reason to fear for their safety at the time of the shooting, and whether they gave warnings before using deadly force.

Both officers assert that Farrow disobeyed repeated orders from Sammis to drop his weapon and get to the ground. The officers contend that instead Farrow began to raise his arms toward the officers while holding the gun in his right hand. Sammis testified that he had yelled, "Police" at the outset of the encounter and that he shouted, "No!" before firing his weapon in the direction of Farrow and Nance. If the trier of fact believes the officers' version of the facts, they would have had probable cause to believe that Farrow posed "a threat of serious physical harm" to them and the use of deadly force in response could have been justified. Moore, 514 F.3d 762.

Nance, the only other living witness to the shooting, related a different set of facts. He testified that the weapon was just a toy gun, that it remained tucked in Farrow's waistband during the confrontation with the officers, and that Farrow was "fixing to get on the ground" at the time he was shot. Nance did not

remember hearing officer Sammis yell, "Police" or "No!" prior to firing. In his interview with the state police Nance stated that Farrow had raised his hands before he was shot. Dr. Konzelman testified in his deposition that it was unlikely that Farrow was raising both arms at the time he was shot, based upon the trajectory of the bullet wounds in his body.

Viewing the controverted record in the light most favorable to the nonmoving parties, as we are required to do at this stage, we must presume that the officers approached Farrow and Nance without identifying themselves as police officers, that the toy gun was tucked in Farrow's pants throughout the entire confrontation, that Sammis only said to drop the gun and get on the ground, and that Farrow may have raised his hand or hands while trying to get to the ground before Sammis shot him twice without warning. These facts taken in the light most favorable to appellees could establish the excessive use of force and unreasonable seizure in violation of Farrow and Nance's Fourth Amendment rights. Pearson, 129 S. Ct. at 815-16; Moore, 514 F.3d at 759.

Police officers are often forced to make split second judgments in circumstances that are "tense, uncertain, and rapidly evolving," Graham, 490 U.S. at 397, and here Sammis and Evans were in the area to watch for armed suspects and they knew they might encounter a dangerous situation. That alone would not permit the use of deadly force, however. If the factfinder were to determine that Farrow raised a handgun towards them and appeared ready to shoot, the use of deadly force could have been objectively reasonable. Since the surrounding factual circumstances are in dispute,

material questions of fact prevent granting summary judgment on the basis of qualified immunity.

Officer Sammis contends that the case law is not sufficiently established on a right to be free from the use of deadly force "where the suspect has in his possession a toy weapon that appears to be real and the suspect does not comply with the officers' commands." For a constitutional right to be clearly established, there does not have to be a previous case with exactly the same factual issues. Hope, 536 U.S. at 739. Although the question must be a particularized inquiry "in light of the specific context of the case," Samuelson v. City of New Ulm, 455 F.3d 871, 875 (8th Cir. 2006), "[g]eneral statements of the law are capable of giving clear and fair warnings to officers even where the very" circumstances confronting the officers has not previously been addressed. Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The right to be "free from excessive force in the context of an arrest is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures." Samuelson, 455 F.3d at 877. There is extensive case law setting forth the requirement that an officer must have "probable cause to believe that the suspect poses a threat of serious physical harm" before using deadly force. See Craighead, 399 F.3d at 962 (collecting cases that put officers on notice that they may not use deadly force under circumstances in which "they should know that the suspect does not present an immediate threat of serious physical injury or harm"). The right of Farrow and Nance to be free from the use of deadly force was clearly established in June 2007. Existing case law would have made it sufficiently clear to a reasonable

officer that a suspect cannot be apprehended by use of deadly force unless that individual poses a threat of serious physical harm.

Officer Evans was also denied qualified immunity in the district court on the issue of excessive force and unreasonable seizure. The claims against Evans are based not only on the use of excessive force but also the failure to prevent its use. Appellees' complaints alleged that officer Evans "made no efforts to prevent the Defendant Sammis from violating the rights" of Farrow and Nance. We have previously recognized that "one who is given the badge of authority of a police officer may not ignore the duty imposed by his office" by failing to act to prevent the use of excessive force. Putnam v. Gerloff, 639 F.2d 415, 423 (8th Cir. 1981). As of June 2007, it was clearly established that an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment. Krout v. Goemmer, 2009 WL 3172180, at *5 (8th Cir. Oct. 6, 2009) (finding case law clearly established on this constitutional right as of July 2006). Other circuits have also recognized the failure to intervene as a basis for liability under a Fourth Amendment excessive force claim. See, e.g. Torres-Rivera v. O'Neill-Cancel, 406 F.3d 43, 51-52 (1st Cir. 2005); Priester v. City of Riviera Beach, 208 F.3d 919, 924-25 (11th Cir. 2000); Mick v. Brewer, 76 F.3d 1127, 1136 (10th Cir. 1996).

In a representative case, the Sixth Circuit rejected an officer's argument for qualified immunity on an excessive force claim on the basis that he had not personally participated in the use of deadly force which injured the plaintiff. Floyd v. City of Detroit,

518 F.3d 398, 406 (6th Cir. 2008). As the court explained,

> A police officer who *fails* to act to prevent the use of excessive force may still be held liable where (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring.

Id. (emphasis in original). The officer had "participated in the tactical decision that he and [his partner] would confront Floyd in the latter's backyard with their guns drawn, without any verbal warning." Id. at 407. The officer had failed to protect the plaintiff, and the fact that he was not the shooter did not absolve him of his responsibility. Id.

Here, Evans confronted the boys with his gun drawn in a poorly lit parking lot. Evans did not identify himself or Sammis as law enforcement officers and admits that he failed to give any warning as to the possible use of deadly force or try to stop Sammis from shooting. Evans' failure to take action to deescalate the situation if he had an opportunity and means to do so could establish liability. Floyd, 518 F.3d at 406; Ngo v. Storlie, 495 F.3d 597, 603 (8th Cir. 2007) (holding qualified immunity inappropriate where "a warning . . . was feasible and the failure to take an extra moment to assess the situation" added to the unreasonableness of the officer's actions). Without impermissible factual determinations of exactly what occurred that evening, we cannot conclude at this stage that Evans is entitled to qualified immunity.

The Nance appellees base their unreasonable seizure claim not only on the use of deadly force, but also on the officers' act of handcuffing Nance following the shooting. While genuine issues of material fact exist with respect to the objective reasonableness of the use of deadly force, we cannot say the same with respect to the handcuffing of Nance. Even if we accept Nance's description of the facts, we could not conclude that it was unreasonable for Sammis and Evans to handcuff him at the scene of the shooting, whether it was for ten or thirty minutes. At that point the officers did not know if Nance was armed or whether he and Farrow should be considered possible suspects in the anticipated convenience store robbery. Moreover, the parties agree that Sammis and Evans turned Nance over to other officers as soon as they arrived.

III.

Significant factual disputes remain with respect to the shooting of DeAunta Farrow and seizure of Unseld Nance. The current record did not conclusively establish whether the actions of officers Sammis and Evans were objectively reasonable. We therefore affirm the ruling of the district court denying the officers summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-1353

[Filed November 10, 2009]

Unseld Nance, Sr., individually and as the natural father and next friend of Unseld Nance, Jr.; Pamela Farrow,	)
Plaintiffs - Appellees,	)
v.	)
Erik Sammis, individually; Jimmy Evans, individually; William Johnson, individually; Robert Paudert, individually,	)
Defendants - Appellants,	)
City of West Memphis, Arkansas; Unknown Arkansas State Police Officers, in their official capacity,	)
Defendants.	)
Deborah Farrow, individually and as co-administrator of the Estate of DeAunta Farrow; Robin Perkins, individually and as co-administrator of the Estate of DeAunta Farrow,	)
Plaintiffs - Appellees,	)

v.	)
	)
Erik Sammis, individually and in official capacity as Officer of West Memphis Police Department; Jimmy Evans, individually; William Johnson, individually; Robert Paudert, individually,	)
	)
Defendants - Appellants,	)
	)
City of West Memphis, Arkansas,	)
	)
Defendant.	)
	)

Appeal from U.S. District Court for the
Eastern District of Arkansas - Jonesboro
(3:07-cv-00119-BSM) (3:07-cv-00189-BSM)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 10, 2009

Order Entered in Accordance with Opinion:

Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

[Filed February 5, 2009]

Case No. 3:07-CV-00119 BSM (Lead Case)

UNSELD NANCE, SR., individually, as the natural father and next friend of UNSELD NANCE, JR.; and PAMELA FARROW[1] PLAINTIFFS	)
v.	)
ERIK SAMMIS, individually; JIMMY EVANS, individually; WILLIAM JOHNSON, individually; ROBERT PAUDERT, individually; CITY OF WEST MEMPHIS, ARKANSAS; and UNKNOWN ARKANSAS STATE POLICE OFFICERS, in their official capacities DEFENDANTS	)

[1] Referred to as the "*Nance* plaintiffs."

CONSOLIDATED WITH:

3:07-CV-00189 (Consolidated Case)

DEBORAH FARROW and ROBIN PERKINS, individually, and as co-administrators of the Estate of DeAunta Farrow[2] PLAINTIFFS	)
v.	)
ERIK SAMMIS, individually; JIMMY EVANS, individually; WILLIAM JOHNSON, individually; ROBERT PAUDERT, individually; THE CITY OF WEST MEMPHIS, ARKANSAS DEFENDANTS	)

ORDER

Presently before the court are the motion for summary judgment filed by separate defendants Sammis, Evans, Johnson, and Paudert, in their individual capacities (Doc. No. 38) and supplement (Doc. No. 82); the motion for summary judgment on the basis of qualified immunity filed by separate defendants Sammis, Evans, Johnson, and Paudert, in their individual capacities (Doc. No. 40) and supplement (Doc. No. 83); and separate defendant the City of West Memphis's motion for summary judgment (Doc. No. 44) filed in the *Nance* case. Also before the

[2] Referred to as the "*Farrow* plaintiffs."

court are the motion for summary judgment filed by separate defendants Sammis, Evans, Johnson, and Paudert, in their individual capacities (Doc. No. 75); the motion for summary judgment filed by the City of West Memphis (Doc. No. 78); and the motion for summary judgment on the basis of qualified immunity filed by separate defendants Sammis, Evans, Johnson, and Paudert, in their individual capacities (Doc. No. 80) filed in the *Farrow* case. Additionally, the court will consider the individual defendants' motion to exclude testimony of plaintiffs' expert (Doc. No. 87).

I. FACTUAL BACKGROUND

Unless otherwise provided, the following facts are undisputed:

On June 22, 2007, Erik Sammis ("Sammis") and Jimmy Evans ("Evans"), police officers with the West Memphis Police Department ("WMPD"), were conducting surveillance in the parking lot of the Steeplechase Apartments. *See* Doc. Nos. 42 and 56 (hereinafter, *Nance* Stmt. of Facts), ¶¶ 2, 5.[3] The surveillance was being performed from a unmarked pickup truck, with Sammis sitting in the driver's seat, and Evans sitting in the passenger seat. *Id.* at ¶ 6; Doc. Nos. 77 and 116 (hereinafter, *Farrow* Stmt. of

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[3] In their response to the *Farrow* Statement of Facts (Doc. Nos. 77 and 116, ¶ 5), plaintiffs state that "[w]hether Sammis and Evans were at the location for the reasons stated, whether the events occurred as stated, these are in dispute," and that "it was unreasonable that Sammis and Evans would be surveiling the Flash Market convenience store from the distance and from their location at Steeplechase Apartments." Plaintiffs, however, provide no support for these assertions.

Facts), ¶ 6. There were five other members of the WMPD on this surveillance team. *Nance* Stmt. of Facts, ¶¶ 2, 5. Four of the members were in a suburban parked in a different location near the target of the surveillance. *Id.*

At approximately 10:00 p.m., Sammis and Evans saw two individuals walking in the direction of the officers' vehicle. *Nance* and *Farrow* Stmts. of Facts at ¶ 7. It was dark out, and the area was dimly lit. *Id.* at ¶ 8. It was later learned that the two individuals walking toward the officers' vehicle were DeAunta Farrow ("Farrow"), who was twelve years old, and Unseld Nance, Jr. ("Nance"), who was fourteen. *Id.* at ¶ 9. Farrow was on the officers' left, and Nance was on the officers' right. *Id.* at ¶ 10.

Defendants contend, but plaintiffs[4] dispute, that Farrow was holding an object in his right hand that both officers identified as a handgun. *Id.* at ¶¶ 11-12. Both officers exited their vehicle to confront Farrow and Nance. *Id.* at ¶ 13. With Sammis on the left and Evans on the right, the officers approached Farrow and Nance. *Id.* at ¶ 14. Defendants contend that the officers had their weapons drawn for their protection because they were confronting at least one apparently armed individual. *Id.* at ¶ 15. Plaintiffs dispute this contention.

Sammis moved toward Farrow, who was on his side, and Evans moved toward Nance, who was on his side. *Id.* at ¶¶ 16-17. Defendants contend, but

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[4] Unless otherwise stated, "plaintiffs" refers to both the *Nance* and *Farrow* plaintiffs.

plaintiffs dispute, that Sammis announced that he and Evans were police and ordered Farrow to drop the weapon. *Id.* at ¶ 18. Defendants also contend, but plaintiffs dispute, that upon Sammis's order to drop the weapon, Nance immediately got to the ground, but Farrow did not drop the weapon nor did he get to the ground. *Id.* at ¶ 19. Defendants further contend that Sammis ordered Farrow to drop the weapon, but Farrow remained standing despite Sammis's repeated commands and Nance's compliance. *Id.* at ¶¶ 20-21. Plaintiffs dispute that Farrow had a gun, toy or otherwise, or that Farrow heard any commands, if any were given. *Id.* The court notes that the *Nance* complaint alleges that defendants Sammis and Evans "simultaneously yelled to the . . . youths to get on the ground and open[ed] fire." *Nance* complaint, ¶ 38.

Defendants contend, but plaintiffs dispute, that Farrow began raising the object the officers believed to be a handgun and that Sammis feared for his life. *Nance* and *Farrow* Stmts. of Facts at ¶¶ 22-23. Defendants also contend, but plaintiffs dispute, that Sammis, sensing a threat, fired two rounds in rapid succession toward Farrow. *Id.* at ¶ 24. It is, however, undisputed that two shots hit Farrow and killed him. *Id.* at ¶ 25.

Sammis directed Evans to handcuff Nance, which he did. *Id.* at ¶ 26. Nance was not physically injured and suffered no physical damages. *Nance* Stmt. of Facts at ¶ 27. Evans made contact with the WMPD to notify them of the shooting and the injuries to Farrow. *Nance* and *Farrow* Stmts. of Facts at ¶ 28. The other members of the surveillance team arrived at the scene of the shooting very quickly. *Id.* at ¶ 29. Because there was a festival occurring in that area of town, there

were other WMPD officers nearby who quickly responded to Evans' call for assistance. *Id.* at ¶ 30. When the other WMPD officers arrived, Evans relinquished control over Nance to the other officers. *Nance* Stmt. of Facts at ¶ 31. The defendants contend that Evans maintained control over Nance for not more than ten minutes; however the *Nance* plaintiffs dispute this contention. *Id.* at ¶ 32. Plaintiffs dispute defendants' contention that Sammis attended to Farrow to assist in his injuries. *Nance* and *Farrow* Stmts. of Facts at ¶ 33.

The Arkansas State Police ("ASP") was notified of the shooting and asked to come and conduct an investigation. *Nance* Stmt. of Facts at ¶ 34. That evening, Mike Middleton, of the ASP, conducted a videotaped interview of Nance, and Nance signed a statement about the shooting. *Nance* Stmt. of Facts at ¶ 35; *Farrow* Stmt. of Facts at ¶ 32. Plaintiffs contend that the statement was not a verbatim record of the interview and that only the videotape reflects the verbatim statements of Nance. *Id.* Plaintiffs dispute defendants' contention that during the interview and in his signed statement, Nance stated that Farrow had a toy gun in his right hand, which was partially raised, when he was shot. *Id.* at ¶ 36. The *Nance* plaintiffs do not dispute that a toy gun, similar to a semi-automatic handgun, was discovered near Farrow's body. The *Farrow* plaintiffs, however, argue that Nance, in his deposition, stated that the toy gun was in the waistband of Farrow's pants. *Nance* Stmt. of Facts at ¶¶ 37-38; Farrow Stmts. of Facts at ¶ 33. The *Farrow* plaintiffs also state that "[i]t was self-serving to Sammis to find the toy gun outside the waistband of DeAunta Farrow, and as such, it is a disputed fact question for the jury." *Farrow* Stmt. of Facts at ¶ 34.

The toy gun was taken into evidence by the WMPD and is in the possession of the ASP. *Nance* Stmt. of Facts at ¶ 39; *Farrow* Stmt. of Facts at ¶ 36.

While the *Nance* plaintiffs admit that none of the separate defendants intended to inflict emotional distress on any of the plaintiffs, the *Farrow* plaintiffs contend that "the customs, policies and procedures of the West Memphis Police Department resulted in the harm and the emotional distress suffered by the Plaintiffs." *Nance* Stmt. of Facts at ¶ 40; *Farrow* Stmt. of Facts at ¶ 37. The *Nance* plaintiffs admit that, aside from the initial command by Sammis to handcuff Nance, none of the separate defendants directed the detention of Nance after the other WMPD officers arrived on the scene. *Nance* Stmt. of Facts at ¶ 41. The *Nance* plaintiffs also admit that neither Robert Paudert, Chief of the WMPD, nor William Johnson, Mayor of West Memphis, directed the actions of Sammis and Evans on the evening of June 22, 2007. *Nance* Stmt. of Facts at ¶¶ 3-4, 42-43. The *Farrow* plaintiffs, however, contend that the customs, policies, and procedures of the WMPD put in place by Paudert guided the actions of Sammis and Evans that night. *Farrow* Stmt. of Facts at ¶¶ 38-39.

None of the separate defendants directed the conduct of the officers who transported Nance to the WMPD, as requested by the ASP, nor did they direct the actions of the officers responsible for the place where Nance was held before being interviewed by the ASP. *Nance* Stmt. of Facts at ¶¶ 44-45. Defendants contend, but the *Nance* plaintiffs dispute, that none of the separate defendants prevented Nance from communicating with his parents. *Id.* at ¶ 46. Unseld

Nance, Jr., and his father, Unseld Nance, Sr., admit that they were never threatened. *Id.* at ¶ 47.

Although the *Nance* plaintiffs dispute that on June 22, 2007, Sammis had 3200 hours of police training, including 1000 hours of training on the use of deadly force, the *Farrow* plaintiffs do not dispute this assertion. *Id.* at ¶ 48; *Farrow* Stmt. of Facts at ¶ 40. Sammis has never been fired from any job for use of excessive force, but the *Farrow* plaintiffs contend that this is only because the WMPD has been deliberately indifferent to numerous citizen complaints.[5] *Nance* Stmt. of Facts at ¶ 49; *Farrow* Stmt. of Facts at ¶ 41. On June 22, 2007, Evans had 687 hours of police training, including training on the use of deadly force, but the *Farrow* plaintiffs state that a significant portion of the training was conducted by Sammis. *Nance* Stmt. of Facts at ¶ 50; *Farrow* Stmt. of Facts at ¶ 42.

Sammis was hired before Chief Paudert became police chief, and therefore, Paudert did not hire Sammis. *Nance* Stmt. of Facts at ¶ 51; *Farrow* Stmt. of Facts at ¶ 43. Although the *Nance* plaintiffs admit that Paudert properly investigated any and all allegations of wrongdoing by Sammis and Evans, and all other officers of the WMPD related to the allegations in this case, the *Farrow* plaintiffs dispute that Paudert properly investigated allegations against Sammis. *Nance* Stmt. of Facts at ¶ 54; *Farrow* Stmt. of Facts at ¶ 46. Neither Johnson nor Paudert is provided information related to every discipline within the

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[5] The *Farrow* plaintiffs failed to provide the pages of Sammis's deposition relied upon in support of their denial.

WMPD, nor must they personally approve all discipline at the WMPD. *Nance* Stmt. of Facts at ¶¶ 57-59; *Farrow* Stmt. of Facts at ¶¶ 50-51.

Although the *Nance* plaintiffs admit that none of the separate defendants' material actions alleged in this case were motivated by racial animus or other unconstitutional motives, the *Farrow* plaintiffs state that this is a jury question. *Nance* Stmt. of Facts at ¶ 57; *Farrow* Stmt. of Facts at ¶ 49. While the *Nance* plaintiffs admit that the WMPD has an internal investigation unit that responds to citizens' complaints of alleged misconduct and investigates those allegations, the *Farrow* plaintiffs dispute this contention. *Nance* Stmt. of Facts at ¶ 59; *Farrow* Stmt. of Facts at ¶ 52

II. PROCEDURAL BACKGROUND

On September 4, 2007, the *Nance* plaintiffs filed their complaint pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986, and 1988 for violation of their rights under the First, Fourth, and Fourteenth Amendments, including violations of the right to familial relations and equal protection. The *Nance* plaintiffs also assert violations of the Arkansas Civil Rights Act, wrongful detention, unlawful arrest, unreasonable seizure, unlawful search, assault and battery, false imprisonment, intentional infliction of emotional distress, gross negligence, and negligence. The case was initially assigned to United States District Judge William R. Wilson, Jr.

On December 10, 2007, the *Farrow* plaintiffs filed their complaint pursuant to 42 U.S.C. §§ 1983, 1985(3), 1986, and 1988 for violation of their rights

under the Fourth and Fourteenth Amendments, including violations of the right to familial relations and equal protection. The *Farrow* plaintiffs also assert violations of the Arkansas Civil Rights Act, wrongful death, false arrest, false seizure, assault and battery, gross negligence, and negligence.[6] The case was initially assigned to United States District Court Judge J. Leon Holmes.

On February 25, 2008, Judge Holmes denied defendants' motion to dismiss the official capacity claims as redundant in the *Farrow* case. On February 26, 2008, however, Judge Wilson dismissed the official capacity claims against defendants Sammis, Evans, Johnson, and Paudert as redundant in the *Nance* case. On April 23, 2008, the *Nance* case was transferred to the undersigned. Subsequently, the undersigned dismissed the official capacity claims in the *Farrow* case for consistency.

On August 28, 2008, defendants filed motions for summary judgment in the *Nance* case. The same day, plaintiffs moved to consolidate the *Nance* and *Farrow* cases. On September 22, 2008, the undersigned granted the motion to consolidate the *Nance* and *Farrow* cases over the objection of defendants. Therein, the court stated that it would hold the pending summary judgment motions in abeyance and would allow supplemental briefing by the parties upon the conclusion of discovery, and therefore, plaintiffs' Rule 56(f) claims were moot. On December 19, 2008,

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[6] Although the *Farrow* plaintiffs initially named the Steeple Chase Apartments as a defendant, Judge Holmes dismissed that defendant on August 18, 2008, upon the *Farrow* plaintiffs' motion.

defendants filed motions for summary judgment in the *Farrow* case, as well as supplements in the *Nance* case and a motion to exclude. Plaintiffs have responded to the outstanding motions. Trial is set for the week of February 17, 2009, in Jonesboro, Arkansas.

III. MOTION TO EXCLUDE (Doc. No. 87)

The individual capacity defendants Sammis, Evans, Johnson, and Paudert ("individual defendants") move this court to exclude the testimony of plaintiffs' proposed expert, Walter Winfrey. The individual defendants assert that Winfrey's testimony should be excluded because plaintiffs failed to provide the necessary disclosures under Rule 26(a)(2), and that they should be awarded the fees, costs, and expenses of the deposition. The individual defendants state that counsel for plaintiffs have informally given notice that they intend to call Winfrey to testify about the use of force matters relevant to this case, yet have failed to comply with Federal Rule of Civil Procedure 26(a)(2) regarding the disclosure of expert testimony.

In response, plaintiffs admit that the "disclosure contemplated by Rule 26(a)(2) regarding the disclosure of expert witness testimony was lacking, however, that is primarily because Winfrey was asked to opine about reasonableness." They state that defendants' deposition of Winfrey "explored every possible police concept, and they are completely aware of his opinions, notwithstanding that all such opinions were not in his report." Plaintiffs assert that the award of fees, costs, and expenses is inappropriate because defendants would have deposed Winfrey regardless of the level of detail of the report.

Alternatively, the individual defendants assert that the testimony is neither reliable nor helpful to the jury. They assert that Winfrey is not qualified as an expert in the use of force because he has never testified in state or federal court as a retained expert witness, has never been retained as an expert witness prior to this case, and has never taught any classes dealing with deadly force. Exhibit D, Winfrey Dep. p. 6-7, 40, Individual Defendants' Motion to Exclude (Doc. No. 87) ("Mot. to Exclude"). The individual defendants state that Winfrey incorrectly believes that the appropriate standard for the use of force is that the officer must exhaust all reasonable means before resorting to deadly force.

In his deposition, Winfrey agreed that he believes that the "standard that applies in this case" is "that Sergeant Sammis did not exhaust all reasonable means before he used deadly force." *Id.* at 29. When asked to explain the constitutional standard for the use of deadly force, Winfrey stated:

> I would think that most police agencies write their own policy as it relates to deadly force, and I don't know if they all compatible with each other, but I think deadly force, whatever policy and how it addressed deadly force, of course, there would be procedures to make every effort to apprehend or diffuse the situation, and, of course, deadly force would be the last effort, and I think the constitution would say before you can revert to deadly force that you would have to be able to articulate that you were placed – you or someone else's life were in imminent danger.

Exhibit D, Winfrey Dep. p. 7, Mot. to Exclude.

The individual defendants also state that Winfrey's testimony does not satisfy the three-part standard set forth in Federal Rule of Evidence 702. First, they assert that his testimony is not based upon sufficient facts or data because he only reviewed the Arkansas State Police investigative file, visited the scene and convenience store involved in the case while accompanied by plaintiffs' attorney, and reviewed the depositions of Sammis and Evans. Second, they assert that Winfrey's opinions are not based upon reliable principles and methods because he based his opinions on his experience as a police officer and, in part, on the medical examiner's determination that the incident was a homicide, although he could not say why experts rely upon this type of information. Third, the individual defendants assert that Winfrey's opinions are not the result of the application of reliable principals and methods to the facts, but are simply subjective statements and speculation. Specifically, the individual defendants assert that Winfrey's sole opinion in this case is that the officers should have turned on their blue lights to make their presence known, rather than exiting their vehicles and verbally making contact with the subjects, but that this has nothing to do with the use of deadly force in this case. They assert that Winfrey offers no alternate course of action at the moment of the shooting, and refused to answer a hypothetical based upon the defendants' version of the facts regarding the reasonableness of using deadly force.

In his amended report, Winfrey opines as follows:

After review of all relevant material, my professional assessment of the matter is that: (1) that the officers were involved in an "alleged sting" concerning a possible convenience store robbery. However, the officers were not parked adjacent nor in close proximity to the area of their alleged surveillance. For whatever reason, the officers were instead parked in an unmarked, unidentifiable pick-up truck (undercover vehicle) three (3) blocks from the alleged "sting" of the convenience store robbery in a public housing community. (2) It is obvious that the officers were attempting to await "anything" they visualized as criminal activity in the public housing community.

Along come two youth, unaware of their alleged "sting," walking in their own community. They did not know who was in the unidentified pickup truck parked by the Dempsey Dumpster. These children obviously had no knowledge that the pickup truck was occupied by two police officers and therefore posed no threat to the officers.

The officers were not in any imminent danger. But instead the officers created a hostile environment by exiting their unmarked, unidentified vehicle and advancing on the two children. The officers created, escalated, and then began a chain of unnecessary events that were clearly preventable which eventually led to the death of DeAunta Farrow.

Any prudent and professionally trained officer, including Sgt. Eric Sammis and Officer Jimmy

> Evans, should have assessed the situation immediately and with absolute and due certainty realized that they were in no imminent danger. Though it is alleged the children were in possession of a "toy gun", the children at no time placed the officers in any imminent danger.
>
> Through the use of the blue light, without even exiting the unmarked undercover vehicle (pickup truck), the officers could have prevented the entire situation.
>
> Instead Sgt. Eric Sammis, in his professional opinion, while on stake-out at a possible convenience store robbery three blocks away felt he was in such grave imminent danger that he exited his undercover vehicle, pulled his weapon and shot a child in his own community at an acceptable hour for children to be outside.
>
> In conclusion, after reviewing all relevant material afforded to me, it is my professional assessment that Sergeant Sammis did not exhaust all reasonable means before he used deadly force in this matter. Moreover, the Arkansas Medical Examiner has ruled this shooting as a Homicide.

Exhibit B, Amended Report, Mot. to Exclude. When asked to give the version of the facts that he was relying upon in giving his opinions, Winfrey testified, "I feel like that I can read a report and come to some kind of logical conclusion as to what happened, and that's based on my experience as a police officer for 30 some years." *Id.* at 35.

Also, in his deposition, Mr. Winfrey was given the following hypothetical:

> Two officers encounter two individuals, one which the officers believed to have a weapon, the officers exit their vehicles and give verbal commands to the two subjects, one of which complies with the command and gets on the ground, the other of which does not comply with the command and begins raising his hands that hold a weapon or what they believe to be a weapon in the direction of the officers, what should the officer do in that situation?

Id. at 36-37. In response, Mr. Winfrey stated, "That's an individual judgment call. All officers don't respond the same way. So there's no way for me to put myself in that because I wasn't there. . . . I don't think there's a set of exact procedures that all police officers will use under that hypothetical situation." *Id.* at 37. He stated that he could not give any examples of what a "reasonable response to that set of facts would be." *Id.*

Plaintiffs assert that Winfrey is imminently qualified to act as an expert because throughout his thirty-one years at the Memphis Police Department, he has held every position in a major city police department, including Chief of Police, with more than 1800 police officers. They state that Winfrey was retained to investigate and form an opinion as to whether the actions of Sammis and Evans were reasonable based on the totality of the circumstances.

Although plaintiffs clearly failed to comply with Rule 26(a)(2), the court will not exclude the expert testimony on this basis. Further, the court declines to

award the costs of the deposition, as the deposition would likely have been taken regardless of compliance with Rule 26. As to the objections raised by defendants, Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Rule 702 was amended in 2000 in response the holdings in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). *See* Fed. R. Evid. 702 advisory committee's note. The 2000 Advisory Committee's note states that trial judges have the responsibility of acting as gatekeepers to exclude unreliable expert testimony. *Id.* A trial court is to consider factors such as:

> (1) whether the expert's technique or theory can be or has been tested---that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability;

(2) whether the technique or theory has been subject to peer review and publication;

(3) the known or potential rate of error of the technique or theory when applied;

(4) the existence and maintenance of standards and controls;

(5) whether the technique or theory has been generally accepted in the scientific community;

(6) whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;"

(7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

(8) whether the expert has adequately accounted for obvious alternative explanations;

(9) whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting;" and

(10) whether the field of expertise claimed by the expert is known to reach reliable result for the type of opinion the expert would give.

Id. The Advisory Committee's note also explains that the terms "principles" and "methods" when applied to

technical or other specialized knowledge may encompass the application of extensive experience to analyze the facts presented. *Id.* If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *Id.*

Although "doubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility," the court "must ensure that the testimony admitted under Rule 702 is both relevant and reliable." *Miles v. General Motors Corp.*, 262 F.3d 720, 724 (8th Cir. 2001) (internal quotations omitted). "[E]xpert testimony not only is unnecessary but indeed may properly be excluded in the discretion of the trial judge 'if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation in respect of the subject under investigation.'" *Salem v. U.S. Lines Co.*, 370 U.S. 31, 35 (1962). Rule 702 "does not rank academic training over demonstrated practical experience," as "an individual can qualify as an expert where he possesses sufficient knowledge gained from practical experience, even though he may lack academic qualifications in the particular field of expertise." *Fox v. Dannenberg*, 906 F.2d 1253, 1256 (8th Cir. 1990) (internal citation omitted).

Although it is clear that Winfrey has extensive experience in law enforcement, the central question is

whether the use of force by the officers was reasonable under the specific circumstances of this case. While Winfrey's training and experience might qualify him to testify as an expert in another case with a different set of facts, the court finds that his testimony would not be helpful in this case because it is not needed to help the jury to decide whether the officers' actions were reasonable. This is true because the facts of this case are not technical and can be accurately and intelligibly described to the jury by the fact witnesses. *See Salem*, 370 U.S. at 35.

The court also finds that Winfrey's testimony does not meet the standard set forth in Federal Rule of Evidence 702. Indeed, most of Winfrey's report focuses on the events leading up to the confrontation between the officers and Nance and Farrow. Other than writing that the officers should have turned on their blue lights, he offers no alternate course of action that the officers should have taken at the time of the shooting. More importantly, when offered a simple hypothetical regarding the reasonableness of using deadly force under a set of facts identical to defendants' version of the events, Winfrey could not answer the question.

For the reasons set forth above, Walter Winfrey is precluded from testifying as an expert witness.

IV. SUMMARY JUDGMENT STANDARD

"Summary judgment is proper if, after viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant, no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law." *Nelson v. Corr. Med. Servs.*, 533 F.3d 958, 961 (8th Cir. 2008) (citing Fed. R.

Civ. P. 56; *Brown v. Fortner*, 518 F.3d 552, 558 (8th Cir. 2008)).

"A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party is not required to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.*

Once the moving party demonstrates that the record does not disclose a genuine dispute on a material fact, the non-moving party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The plain language of Rule 56(c) mandates the entry of summary judgment against a non-moving party which, after adequate time for discovery, fails to make a showing sufficient to establish the existence of an element essential to its case, and on which that party will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 322.

V. DISCUSSION

In their motions for summary judgment, defendants assert that summary judgment is appropriate because they are entitled to qualified immunity. Additionally, defendants assert that they engaged in no conduct resulting in the violation of

plaintiffs' constitutional rights and that plaintiffs cannot establish their liability.

A. Motion for Summary Judgment (Doc. No. 38) and Supplement (Doc. No. 82); Motion for Summary Judgment on the Basis of Qualified Immunity(Doc No. 40) and Supplement (Doc. No. 83); Motion for Summary Judgment (Doc. No. 75); and Motion for Summary Judgment on the Basis of Qualified Immunity (Doc. No. 80)

Section 1983 provides a cause of action against government officials who deprive persons of "rights, privileges, or immunities secured by the Constitution." *Nelson*, 533 F.3d at 961 (citing 42 U.S.C. § 1983). "Government officials are entitled to a dismissal 'if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 961-62 (citing *Sanders v. City of Minneapolis, Minn.*, 474 F.3d 523, 526 (8th Cir. 2007)).

In considering whether an officer is entitled to qualified immunity, the court determines whether the allegations amount to a constitutional violation, and whether that right was clearly established." *Id.* at 962. "Qualified immunity is not just a defense to liability, it constitutes immunity from suit." *Id.* Qualified immunity is a question of law for the court. *Robinette v. Jones*, 476 F.3d 585, 591 (8th Cir. 2007). "Whether an official is entitled to qualified immunity depends upon the objective legal reasonableness of the official's actions assessed in light of the legal rules that were clearly established at the time of the actions in

question." *Id.* (citing *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)) (internal quotation marks omitted).

If either the allegations and undisputed facts do not amount to a constitutional violation, or the right was not clearly established, the officer is entitled to qualified immunity. *Pearson v. Callahan*, No. 07-751, 2009 WL 128768, *9 (U.S. Jan. 21, 2009) (holding that the sequence of the *Saucier* two-part test is no longer mandatory). "To withstand a motion for summary judgment on qualified immunity grounds, a civil rights plaintiff must (1) assert a violation of a constitutional right; (2) demonstrate that the alleged right is clearly established; and (3) raise a genuine issue of fact as to whether the official would have known that his alleged conduct would have violated [the] plaintiff's clearly established right." *Goff v. Bise*, 173 F.3d 1068, 1072 (8th Cir. 1999).

1. Excessive Force and Unlawful Initial Detention/Arrest Claims by Farrow and Nance against Sammis and Evans

"*[A]ll* claims that law enforcement officers have used excessive force-deadly or not-in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . ." *Graham v. Conner*, 490 U.S. 386, 395 (1989). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* (citing *Tennessee*

v. Garner, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983))).

"[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." *Id.* Proper application of the reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* "The calculus of reasonableness must embody allowance for the fact that the police officers are often forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

"As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. "An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.*

"Whenever an officer restrains the freedom of a person to walk away, he has seized that person." *Garner*, 471 U.S. at 7. "A police officer may arrest a person if he has probable cause to believe that person committed a crime." *Id.* "A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." *Id.* at 11. It is constitutionally permissible for an officer to use deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others . . . ." *Id.* Thus, if the suspect threatens the officer with a weapon . . ., deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11-12.

"The law distinguishes between a seizure and a stop." *United States v. Gannon*, 531 F.3d 657, 661 (8th Cir. 2008) (citing *Terry v. Ohio*, 392 U.S. 1, 10 (1968)). "While police must have probable cause in order to arrest (or seize) a person, they need only have reasonable suspicion that criminal activity is afoot to stop someone." *Id.* "There is no 'neat set of legal rules' that governs the determination whether the police had reasonable suspicion." *Id.* (quoting *United States v. Barker*, 437 F.3d 787, 789 (8th Cir. 2006)). "An officer's suspicion is reasonable if he 'knows particularized, objective facts that lead to a rational inference that a crime is being or has been committed.'" *Id.* (quoting *United States v. Hernandez-Hernandez*, 327 F.3d 703, 706 (8th Cir. 2003)). "But reasonable suspicion is more than an inarticulable hunch, it must instead be based on specific and articuable facts, which taken together with rational inferences, support the stop." *Id.* In determining whether the police had reasonable suspicion, the court examines the totality of the circumstances "through the eyes of the officers,

because they are trained to cull significance from behavior that would appear innocent to the untrained observer." *Id.* (quoting *Barker*, 437 F.3d at 790).

"A detention may become a *de facto* arrest if it lasts for an unreasonably long time, but there is no rigid time limit on an investigatory detention." *United States v. Maltais*, 403 F.3d 550, 556 (8th Cir. 2005). In determining whether a period of time is excessive, the court must consider the "law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes." *Id.* (quoting *United States v. Sharpe*, 470 U.S. 675, 685 (1985)). "In assessing the effect of the length of the detention, [the court must] take into account whether the police diligently pursue their investigation." *Id.* at 557 (citing *Sharpe*, 470 U.S. at 685 (quoting *United States v. Place*, 462 U.S. 696, 709, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983))).

First, viewing the evidence in the light most favorable to plaintiffs, the court must determine whether the defendants' conduct violated a constitutional right. *Moore v. Indehar*, 514 F.3d 756, 759 (8th Cir. 2008). Here, it is alleged that defendants Sammis and Evans pointed their weapons at Nance and Farrow, shot in the direction of Nance and Farrow (with two fatal shots striking Farrow), and that upon Sammis' order that Evans handcuff Nance, Evans placed handcuffs on Nance.

The crucial determination in this case is whether defendant Sammis' belief that Farrow posed a threat of serious physical harm to him was objectively reasonable, which turns in large part on whether Farrow, in fact, held a toy gun in his hand that could

be mistaken for a real gun and raised it toward Sammis. If so, defendants Sammis and Evans are likely entitled to qualified immunity. *See Sample v. Bailey*, 409 F.3d 689, 697 (6th Cir. 2005) (citing *Boyd v. Baeppler*, 215 F.3d 594, 604 (6th Cir. 2000) (upholding qualified immunity for police officers who used deadly force against a suspect who had a gun in his hand and who pointed it at officers and others); *Bell v. City of East Cleveland*, No. 96-3801, 1997 WL 640116, at *3 (6th Cir. Oct. 14, 1997) (upholding qualified immunity for a police officer who shot and killed a boy who pointed a toy gun at the officer); *Rhodes v. McDannel*, 945 F.2d 117, 120 (6th Cir. 1991) (upholding qualified immunity for police officer who shot and killed a homeowner who approached police officers with a raised machete in his hand and ignored repeated warnings to drop the weapon), *cert. denied*, 502 U.S. 1032, 112 S.Ct. 872, 116 L.Ed.2d 777 (1992)).

During the recorded interview of Nance at approximately 12:30 a.m. on June 23, 2007, by Mike Middleton of the ASP, Nance gave the following account of the events that evening:

> Q. Okay. Unseld, what happened this afternoon, this - - or tonight?
>
> A. We were walking - -
>
> Q. You said we. What's - - what's the young man's name?
>
> A. DeAunta.
>
> . . .

Q. Okay. And what did you see when y'all were walking?

A. Two people got out of the car and pointed guns.

Q. Okay. Could — could you tell what they looked like?

A. Couldn't see that, back that far away.

Q. Could you tell how they were dressed?

A. They had like camouflage pants at the time.

Q. What type of guns did you see?

A. We couldn't see anything.

Q. Couldn't see them holding anything?

A. Well, flashlights.

Q. Flashlight? Okay. Did they tell you anything? Or tell DeAunta anything?

A. They told us to get on the ground. They told him to put the gun down.

Q. Did they say who they were?

A. Uh uh.

Q. Who did you think they were when they were telling you all to get on the ground.

A. I thought they was people playing.

Q. And what did DeAunta do with the gun?

A. I wasn't looking at him.

Q. You were - - oh, you weren't looking at him?

A. I was on the ground.

Q. Okay. So you obeyed what they told you to do? You got on the ground. And you didn't see what DeAunta was doing?

A. Uh-uh.

Q. Okay. Then what did you hear or see next?

A. A gunshot.

Q. How many shots did you hear?

A. One.

Q. Did you - - when the man told you to get down, did you think they were police officers or - -

A. I thought they were police officers.

Q. Is that why you obeyed them? Okay. Did you hear them say police or - -

A. Uh-uh. They just said get on the ground.

Q. But you thought for some reason they were policemen? Did you see something on their uniforms to indicate that? Badge? Patch?

A. Uh-uh.

. . .

Q. Okay. What happened after you heard the gunshot?

A. He was just laying on the ground.

Q. What did you do then?

A. I was - -

Q. Were you still laying on the ground? Okay. What did the officers tell you then? What did you hear or see then?

A. They told them they needed an ambulance.

Q. Were they on the radio calling for help or - -

A. Yeah.

Q. Where did you go after that? Did they keep you there or - -

A. They kept me there and put handcuffs on me and put me inside of a police car.

Q. Okay. What type of gun did DeAunta have?

A. A black gun.

Q. Well, did it shoot anything?

A. Uh-uh.

. . .

Q. Was it dark when this happened?

A. Yes.

. . .

Q. Had he been walking with it in his hand or

. . .

A. Mm-hmm. In his hand, he was trying to cover it up.

Q. So as y'all were walking he had it in his hand but - -

A. He was trying to cover it up.

Q. Why was he trying to cover it up?

A. When we were walking he put it - - he had it tucked like this.

. . .

Q. Did you ever see him pointing at anybody with the gun or anything?

A. No.

. . .

Q. Can you stand up and show this investigator and I how he was carrying the gun? Stand

up and show us how he was walking with the gun.

A. He had the gun like this. And he had the black park showing.

. . .

Q. The handle was showing? The barrel was tucked in under his shirt?

A. He had it like this.

Q. But when these - - these men gave you all a command to get on the ground and they also gave a command for him to do what with the gun?

A. Put it on the ground. And he had his hands up like this and the gun was pointed down.

Q. So he had the gun in his right hand?

A. Right hand.

Q. But you were laying down. And which way were you looking when you were laying?

A. This way.

Q. Looking back?

A. I was looking that way.

Q. Which side was he from you?

A. He was on this side.

Q. He was on your left side? Okay.

A. Facing forward when they shot the gun.

. . .

Q. Do what, son? I didn't hear you.

A. I had looked forward, that's - - when the person shot the gun.

. . .

Q. So at that moment you were looking forward. Did you see him shoot the gun?

A. Uh-uh. I just heard it.

Q. Were you looking towards the officer, the man - -

A. I was looking towards the tree.

. . .

Q. What did you hear the officers say?

A. Get on the ground and drop the gun.

. . .

Q. And do you know what - - did you see what he did during that time or you just - - you immediately went on the ground?

A. I was down on the ground and he was - - had his hands like this - -

Q. Okay.

A. - - and the gun was facing down.

Q. But when he was walking down the street, you said he had it underneath his - - carrying it underneath his shirt like this?

A. Mm hmm. He had it underneath.

Q. Okay.

. . .

Q. You said earlier that you got on the ground. As they said - - as they commanded you or told you to and you said that you felt that they were police, what made you think that they were police?

A. They were yelling.

. . .

Q. Could you hear them say police, get down, or you just don't remember?

A. They didn't say police.

. . .

See Attachments to Exhibit 5, Middleton's Aff., Defendants' Motions for Summary Judgment (Doc. Nos. 38, 40, 75, 80) ("Defs.' Motions"). The court notes that it did not have the benefit of viewing the videotape of Nance's interview at the police station, which would likely clarify some statements made during said interview. The interview concluded at 1:07 a.m. *Id.*

At the conclusion of the interview, the officer provided Nance with a handwritten statement purporting to summarize Nance's statement, which states in pertinent part:

> We were going back to Candace's house to get my cell phone. De[A]unta brought a toy pistol[.] [I]t was gray black handle it had a orange thing on it. De[A]unta was carrying with his right hand as we walked it was under his shirt with the handle showing. We saw 2 men get out of a black pickup truck by a dumpster they had two flashlights. Then one of them said get on the ground. I got on the ground De[A]unta was standing. His arms were partially raised up the toy gun was in his right hand. I was looking straight and didn't see the men. They said drop the gun. De[A]unta was fixing to get on the ground when they shot. I got down as they said I felt that they were Police because they were yelling. I heard a shot[.] I didn't see De[A]unta fall. I looked back and he was on the ground.
>
> They called for an ambulance. One of them told the other to put the handcuffs on me. Another Police Officer brought me down to the Police Station.

Id.

During his deposition, Nance testified as follows:

> Q. And finally, during the statement that you provided to the police, did he tell you - - the statement that you signed rather, this

Exhibit Number 2, the officer wrote the statement, did he not?

A. Yes, he wrote it.

Q. Okay. Did he change anything of what you said in your original statement to him? Did you tell the officer that De[A]unta was carrying with his right hand as we walked, did you tell him that?

A. Yes.

Q. You did?

A. Yes.

Q. Okay. Did you also tell him that the - - it was under his shirt with the handle showing?

A. Yes.

Q. And when you say in the statement it was under his shirt with the handle showing, were you talking about the gun? Were you talking about the toy gun?

A. Yes.

Q. And when you said it was under his shirt with the handle showing, was that - - was this toy gun under his shirt with the handle showing at the time that Officer Sammis shot your cousin?

A. No.

Q. It wasn't?

A. No.

Q. Where was it at?

A. It was - - it was tucked in his pants.

Q. Okay. That's what I'm saying. It was tucked in his pants. So at the time that Officer Sammis shot your cousin De[A]unta Farrow, this statement is correct it was under his shirt with the handle showing; is that correct?

A. Yes.

Exhibit 3, Nance Dep. p. 49-50, *Nance* Plaintiffs' Amended Response. (Doc. No. 57) ("Pltfs.' Am. Resp."); Nance Dep. p. 50, *Farrow* Response (Doc. No. 116) ("*Farrow* Resp.").

During his deposition, Sammis testified that while sitting in the truck, he saw two individuals walking, and stated to Evans, "Jimmy, he's got a gun in his hand." Exhibit 12, Sammis Dep. p. 97, Defs.' Motions. After Evans confirmed this, Sammis stated, "we've got to go," and they exited the truck drawing their weapons. *Id.* Sammis testified that he began screaming "police, drop the gun," as they were moving forward toward the two individuals. *Id.* at 98. Sammis testified that Nance went to the ground immediately, and Farrow stopped. *Id.* Sammis also testified that Farrow started to raise the gun, and he yelled again,

"drop the gun." *Id.* As Farrow "started to come up," Sammis testified that he yelled "no," and fired two rounds fairly quickly "because that gun kept coming out to the center." *Id.* During his deposition, Evans confirmed that as Sammis yelled no, Farrow was raising his arm. Exhibit 12, Evans Dep. p. 48, Defs.' Motions. In his affidavit, Sammis states that he "reasonably believed that Farrow's action posed an immediate threat and [he] feared for [his] life when Farrow raised the gun, so [he] fired two shots in rapid succession." Exhibit 3, Sammis Aff. ¶ 10, Defs.' Motions.

The *Farrow* plaintiffs submit the deposition of Dr. Daniel Konzelman, the medical examiner in this case, asserting that Dr. Konzelman stated that it would be a very odd position for the decedent to appear to be firing his weapon at Sammis based on the trajectory of the bullet wounds suffered by DeAunta Farrow. Dr. Konzelman testified as follows:

> Q: Now, as you've already stated, the wound to the chest, the bullet that went into the chest came out the side of the torso and entered into the upper arm of DeAunt[a] Farrow; is that correct, sir?
>
> . . .
>
> A: It appeared to re-enter the upper arm, yes.
>
> Q: Okay. And when that occurred -- could that have occurred if DeAunt[a] Farrow's arms were up in front of him as I am performing now?
>
> A: The left arm would appear to have not been in that position.

> Q: If my arms were directly out in front of me, fully extended, or above my head, fully extended, is it likely that the bullet would have entered the upper arm as it did?
>
> A: If the left arm was extended, as well as the right, no, I don't believe that that would be the right angle. However, what the left arm is doing, in this case, is all that I know. I do not know what the right arm was doing.

Konzelman Dep. pp.53-54, Farrow Brief (Doc. No. 100).

Sammis testified that as Farrow went down, he could see that Farrow did not have anything in his left hand, but his right hand was underneath him, which concerned him. Exhibit 12, Sammis Dep. p. 99, Defs.' Motions. Sammis instructed Evans to handcuff Nance. *Id.* Sammis testified that as he approached Farrow, he asked if he was hit and where the gun was, and Farrow stated, "yes, it's a toy gun." *Id.* As Sammis lifted Farrow's left shoulder up, he saw "the handle, the butt of this gun, underneath his waistline." *Id.* at 99-100.

Sammis testified that he did not see Nance commit any criminal violation, but states that he "had a legitimate reason to handcuff him." Exhibit B, Sammis Dep. p. 110, Brief in Support of Response to Motion for Qualified Immunity (Doc. No. 52) ("Pltfs.' Resp."). He stated, "If I encounter somebody with a gun and he's with somebody, I am going to detain that individual to make sure he doesn't have a gun, too. Granted, we

didn't see it in his hands, but that's not saying he didn't have it in his belt." *Id.*

Here, there are genuine issues of material fact as to whether Farrow held a toy gun in his hand that could be mistaken for a real gun and raised it toward Sammis, or if the toy gun was "tucked in" Farrow's pants at the time Sammis fired his weapon. Although Nance's version of the events is not entirely clear, taking the facts in a light most favorable to plaintiffs, the court must assume that the toy gun was "tucked in" Farrow's pants at the time Sammis fired his weapon. It is unclear whether Nance contends that the handle of the gun was showing at the time Sammis fired his weapon. Thus, Sammis and Evans are not entitled to qualified immunity as to the excessive force and unlawful initial detention/arrest claims, at this point, because genuine issues of material fact exist.

The court must also consider "whether the right was clearly established at the time of the deprivation such that a reasonable official would understand his conduct was unlawful in the situation he confronted." *Moore v. Indehar*, 514 F.3d 756, 759 (8th Cir. 2008). "This second step is a fact-intensive inquiry and must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* (quoting *Samuelson v. City of New Ulm*, 455 F.3d 871, 875 (8th Cir. 2006) (internal quotations omitted)). "The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person." *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1998). *See also Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir. 1996) (stating that a person has "a clearly established right under the Fourth Amendment not to be arrested

unless there [is] probable cause for [the] arrest")). Because the facts are not established in this case, it is not possible, at this time, to make a determination regarding this factor.

2. Unlawful Continued Detention of Nance by Sammis and Evans

Plaintiffs allege that defendants Sammis and Evans continued to unlawfully detain Nance in violation of the Fourth Amendment (the "continued detention"). Viewing the evidence in the light most favorable to plaintiffs, the court must determine whether the defendants' conduct violated a constitutional right. *Moore v. Indehar*, 514 F.3d 756, 759 (8th Cir. 2008).

During his deposition, Nance testified as follows:

> Q. Unseld, you testified earlier that at the scene the police officers put handcuffs on you?
>
> A. Yes.
>
> Q. And put you by the tree for about 15 minutes; is that correct?
>
> A. Yes.
>
> Q. Did you feel like you could leave?
>
> A. No.
>
> Q. If you had just walked off, do you think they would have stopped you?

A. Yes.

Q. Okay. You testified also that when you got in the police car that you were - - you still were in handcuffs in the police car?

A. Yes.

Q. And you testified that you were there about ten minutes?

A. Yes.

Q. Did you feel like you could get out of the police car and walk off?

A. No.

Q. Okay. When you got to the police department and you were sitting on that bench, do you know how long you were sitting on that bench?

A. No.

Q. Was it about 30 minutes?

A. About 20.

Q. About 20 minutes. You had the handcuffs on you?

A. Yes.

Q. Did you feel like you could leave?

A. No.

Q. The officers told you not to talk to your father; is that correct?

A. No.

. . .

Q. So - - but you didn't talk to your father the whole time you were in the police department; is that correct?

. . .

A. No.

Exhibit 3, Nance Dep. p. 47-49, Pltfs.' Am. Resp. Nance also testified that his father was in the room at the police station with him when he was interviewed. *See* Exhibit 14, Nance Dep. p. 13, Defs.' Motions. He indicated that nobody said anything to him that made him feel like he was going to be separated from his parents, nobody threatened him, and he did not feel threatened. *Id.* at 33.

Evans testified that after he handcuffed Nance, he called the rescue response team, and in "a matter of a minute, maybe," Officer Rains took custody of Nance. Exhibit 13, Evans Dep. p. 74, Defs.' Motions. Sammis testified that the first person he saw "show up" was Captain Oaks, and Sammis said to him, "[T]his is yours." Exhibit 12, Sammis Dep. p. 101, Defs.' Motions. He further testified that he was "rattled" at that point and could not "direct subordinates at that point." *Id.*

Nance's father, Unseld Nance, Sr., testified that when he arrived at the scene of the shooting, a female

officer told him that his "son was okay," but he could not see him at that point. Exhibit 4, Nance Sr. Dep. p. 31, Pltfs.' Am. Resp. After thirty or forty-five minutes, he asked again, and the female officer gave the same response. *Id.* Fifteen or twenty minutes later, the officer told Nance's father that Nance was at the police station, and took Nance's father to the station. *Id.* When Nance's father arrived at the police station and saw Nance handcuffed, he asked an officer about it, and the officer removed the handcuffs, but told Nance's father that he could not talk to Nance about what just happened. *Id.* at 34. Nance's father was told that they had to wait for the ASP to arrive to give a statement before they left. *Id.* at 37-38. Nance's father testified that he did not recall whether he asked to leave or whether he told anyone that he did not want his son to give a statement. *Id.* at 38-39. Nance's father also testified that the only thing that he felt was threatening in the treatment of his son was the handcuffs. *See* Exhibit 15, Nance Sr. Dep. p. 44, Defs.' Motions.

Taking the facts in a light most favorable to plaintiffs, the encounter between Nance, Farrow, Sammis, and Evans occurred at approximately 10:00 p.m. on June 22, 2007. At the direction of Sammis, Evans handcuffed Nance just after the shooting. The other WMPD officers quickly arrived at the scene, and upon their arrival, relieved Evans of responsibility for control over Nance. Nance was handcuffed for a total of approximately 45 minutes. At approximately12:30 a.m. on June 23, 2007, the interview of Nance occurred, in the presence of Nance's father, until approximately 1:07 a.m.

Based upon these facts, Evans and Sammis relinquished control of Nance shortly after the arrival of the other WMPD officers. Therefore, it appears that Evans and Sammis cannot be held responsible for the continued detention of Nance beyond that event and are entitled to qualified immunity as to the continued detention. Although the continued detention of Nance appears to have been unnecessary and unwarranted, plaintiffs have failed to name any individual responsible for the detention.

3. Supervisor Liability of Paudert and Johnson

That genuine issues of material fact remain as to Sammis' and Evans' liability does not answer whether Chief Paudert and Mayor Johnson are entitled to qualified immunity. To overcome the entitlement to qualified immunity, plaintiffs must allege, and present evidence that could support that Paudert and Johnson violated a well-established constitutional right of plaintiffs. *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997).

"Section 1983 liability cannot attach to a supervisor merely because a subordinate violated someone's constitutional rights." *Id.* "[A] supervisor may be held individually liable under § 1983 if he directly participates in a constitutional violation or if a failure to properly supervise and train the offending employee caused a deprivation of constitutional rights." *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996). Also, "supervising police officials act unconstitutionally in 'failing to adequately receive, investigate, or act upon complaints of [misconduct] by police department employees . . .." *Id.*

For a supervisor to have violated a plaintiff's constitutional rights by failing to train or supervise, or by failing to adequately receive, investigate, or act upon complaints of misconduct, it must be shown that the supervisor: "(1) Received notice of a pattern of unconstitutional acts committed by subordinates; (2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts; (3) Failed to take sufficient remedial action; and (4) That such failure proximately caused injury [to the plaintiffs]." *Id.*; *Otey*, 121 F.3d at 1155.

"[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *Otey*, 121 F.3d at 1156 (quoting *Canton v. Harris*, 489 U.S. 378, 388 (1989)). "It is necessary to show 'that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.'" *Id.* (quoting *Fowler*, 98 F.3d at 1076 (quotations and citations omitted)). In order to demonstrate deliberate indifference or tacit authorization, the plaintiff must show that "the supervisor had notice that the training procedures and supervision were inadequate and likely to result in a constitutional violation." *Fowler*, 98 F.3d at 1078.

As to direct participation, the *Nance* plaintiffs admit that Paudert and Johnson did not direct the actions of Sammis and Evans on the evening of June 22, 2007. The *Farrow* plaintiffs only contend that the

customs, policies, and procedures of the WMPD put in place by Paudert guided the actions of Sammis and Evans that night or that Sammis deviated from those customs, policies, and procedures. The *Nance* plaintiffs admit that Paudert and Johnson did not direct the conduct of the officers who transported Nance to the WMPD at the request of the ASP, and did not direct the actions of any officer or official who had responsibility for the place where Nance was interviewed. These facts provide no basis upon which to find Paudert or Johnson liable for direct participation in a constitutional violation.

Furthermore, the record is devoid of any basis for imposing liability on Paudert or Johnson for failure to supervise or train Evans, or adequately receive, investigate, or act upon complaints of misconduct by Evans. Plaintiffs admit that on June 22, 2007, Evans had 687 hours of police training, including training on the use of deadly force. Plaintiffs submit no evidence of any prior misconduct by Evans. Thus, there is no basis upon which to find Paudert or Johnson liable for the actions of Evans.

With regard to the claim that Johnson and Paudert failed to train Sammis, defendants submit the training record of Sammis, which reflects 3248 total training hours, including training on the proper use of force, as of the date of the shooting. *See* Attachment to Exhibit 3, Sammis' Aff., Defs.' Motion. Although the *Nance* plaintiffs dispute the number of training hours, contending that "Sammis certified himself," the *Farrow* plaintiffs do not dispute the number of training hours. The portion of Sammis' deposition testimony cited by the *Nance* plaintiffs reflects that Sammis was certified to teach a use of force course by

the Commission on Law Enforcement Standards and Training in Arkansas. Exhibit 1, Sammis Dep. p. 33, Pltfs.' Am. Resp. Further, Sammis testified that "[y]ou send the actual course material off to get certified," that he prepared the course material that was sent off for certification, and received certification. *Id.* at 33-35. He stated that someone must review the information sent off for certification, but did not recall who would have done so in his case. *Id.* at 34. On these facts, the court cannot find that there is any genuine issue of material fact as to plaintiffs' claim that Johnson and Paudert failed to train Sammis.

Regarding plaintiffs' claim of failure to supervise Sammis and adequately receive, investigate, or act upon complaints of misconduct by Sammis, plaintiffs admit that Sammis has never been fired from any job for use of excessive force, although the *Farrow* plaintiffs contend that this is only because the WMPD has been deliberately indifferent to numerous citizen complaints. The *Nance* plaintiffs submit the deposition of Sammis, in which he details the reprimands he has received. Sammis states that while he was working in the narcotics division, he made a traffic stop in which the driver was arrested and the vehicle was towed. Exhibit 1, Sammis Dep. p. 52, Pltfs.' Am. Resp. Sammis found two swords in the trunk of the vehicle, which he took and logged in the upstairs evidence locker in the narcotics division. *Id.* at 52-53. Although it is WMPD policy that the evidence "wind up downstairs" in general lockup, Sammis kept the swords upstairs in the narcotics office until the court date, at which time the swords were returned to the owner and release forms were signed by the owner. *Id.* at 53. The owner filed a complaint with the city

attorney, and Sammis testified that he received a letter of reprimand as a result. *Id.*

Sammis also testified that an individual made a claim that Sammis had stolen a necklace, but when the individual "got out of jail and found his necklace in the car," "he recanted it." *Id.* at 52. Sammis further testified that he received letters of reprimand for two traffic accidents on duty. *Id.* at 53-54. He also either received a letter of reprimand or a day of suspension for a comment he made to a captain concerning a uniform violation. *Id.* at 54.

Sammis testified that Joyce Gray, a former city council member, filed an excessive force complaint regarding the arrest of Ronnie Love during a "buy bust operation," but Ms. Gray did not realize that Sammis was in St. Louis at the time of the incident. *Id.* at 55. There is no indication in the record to dispute Sammis' statement and no information regarding the disposition of this complaint.

The *Nance* plaintiffs also assert that Sammis lied about the actions he took while on duty, resulting in his termination from the North Little Rock Police Department. Review of the portions of Sammis' deposition submitted, however, reveals no discussion of this alleged incident, and the *Nance* plaintiffs provide no other support for the allegation.

Additionally, the *Nance* plaintiffs submit a complaint from *Howard v. Sammis*, 2:04-cv-00095 JLH, a civil case filed in the Eastern District of Arkansas in 2004 alleging excessive force, unreasonable arrest, violations of due process, battery, and false arrest. In his deposition, Sammis stated that

this was an off-duty employment case, in which a "fight broke out" when he and another officer attempted to place an individual under arrest at the racetrack. Exhibit 1, Sammis Dep. p. 15, Pltfs.' Am. Resp. Three members of the Howard family were arrested, and subsequently filed suit against Sammis and others. *Id.* at 15-16. Sammis testified that the case was settled "against our own wishes." *Id.* at 17. Sammis could not say whether any member of the Howard family filed a complaint with the WMPD against him. *Id.* at 56.

The *Farrow* plaintiffs submit excerpts of Kathy Howard's deposition, in which she testified that her husband "couldn't get ahold of anybody to let us - - to let them know what he did to us, that's when we decided to sue because we wanted him off the police force." Howard Dep. p. 21, Exh. to *Farrow* Stmt. of Facts (Doc. No. 116). She stated, however, that she did not know whether she was in the room when her husband called, she never called, and there was never a written complaint made to the WMPD. *Id.* at 24. She testified that they settled the case, although she regrets doing so. *Id.* at 21-22. She also testified that Sammis was "overaggressive," but the submitted excerpts do not set forth the factual allegations by Howard. *Id.* at 22-23. The *Farrow* plaintiffs also submit the deposition of defendant Johnson, who testified that he only discussed the *Howard* case with the city attorney at the time of settlement. Johnson Dep. p. 5, Exh. to *Farrow* Stmt. of Facts (Doc. No. 116).

Johnson also stated that he heard the testimony by defendant Paudert that the WMPD does not keep a log of telephonic complaints. *Id.* at 6. The Policy and Procedure Manual, however, states, "It is the policy of

the Department that all complaints, including those, which are made anonymously, by means of telephone, in writing, or in person, shall be promptly documented and then immediately forwarded to the Chief of Police and the Internal Affairs Commander." Policy and Procedure Manual, Exh. to *Farrow* Stmt. of Facts (Doc. No. 116).

The *Nance* plaintiffs also submit a news article dated August 14, 2008, in which it is alleged that seven cases of police abuse are pending against West Memphis police, and a large number of lawsuits are currently being settled out of court. Exhibit 9, Article, Pltfs.' Am. Resp. The *Nance* plaintiffs fail to submit details regarding these cases, including which officers were involved and when the alleged incidents of police abuse occurred. A news article is not evidence.

The *Farrow* plaintiffs submit portions of Sammis' deposition, in which he testified that there were approximately ten canine biting incidents involving the canine that he controlled. Sammis Dep. pp. 62-63, Exh. to *Farrow* Stmt. of Facts (Doc. No. 116). Sammis testified that he commanded the canine to bite both felony and misdemeanor suspects involved in those cases. *Id.* The *Nance* plaintiffs note that defendant Johnson testified that he abolished the canine patrol in January 1999 because of the number of complaints regarding dog bites, and the *Farrow* plaintiffs provided the referenced deposition pages. Johnson Dep. pp. 21-23, Exh. to *Farrow* Stmt. of Facts (Doc. No. 116). Johnson testified that three or four people verbally mentioned it to him, and the assistant chief had received some complaints "not about anybody specifically, just the unit." *Id.* at 22-23. Johnson testified that he did not know at the time that Sammis

was the K9 unit officer, and was not aware of Sammis' previous history prior to his deposition. *Id.* at 22, 24. The *Farrow* plaintiffs also submit the WMPD Policy and Procedure regarding dog bites, which states:

> DOG BITES:
> In the event a person should be bitten by the K-9, the K-9 officer will file all required reports. A copy of the report shall be submitted to the K-9 supervisor for approval, and the supervisor will assure the accuracy of the report and submit the report to the Chief of Police.

Policy and Procedure Manual, Exh. to *Farrow* Stmt. of Facts (Doc. No. 116).

In *Otey*, the plaintiff presented two pieces of evidence that the police chief had received notice that the officer who shot him was prone to using excessive force. 121 F.3d at 1155. Specifically, the officer "had once fired warning shots to quell a disturbance at a dance hall, an action that directly violated Elaine Police Department procedure[,]" and an individual "alleged in an affidavit that her two children had complained of [the officer] using excessive force and that [the police chief] knew of these complaints." *Id.* at 1155-56. The plaintiff alleged that in neither of these cases did the police chief discipline or counsel the officer. *Id.* at 1156. The Eighth Circuit held that even assuming the allegations were true, they failed to state a violation by the police chief of the plaintiff's constitutional rights. *Id.* The court reasoned that while the officer's use of warning shots was prohibited by the police department's policy, such action did not put the police chief on notice that the officer engaged in a pattern of unconstitutional acts because the action

"simply did not violate anyone's constitutional rights." *Id.* Moreover, the court stated that the affidavit did not specify "when excessive force was allegedly used, what the alleged excessive force consisted of, nor when the complaints of excessive force were allegedly made," and thus, there was no evidentiary support for the allegation that the police chief was on notice of the alleged violations. *Id.*

Here, it is undisputed that Paudert did not hire Sammis, as Sammis was hired before Paudert became Chief of the WMPD. It is also undisputed that defendants Johnson and Paudert are not provided information related to every discipline within the WMPD, nor must they personally approve all discipline at WMPD, as complaints are handled by the internal investigation unit.

As stated above, in order to demonstrate deliberate indifference or tacit authorization, plaintiffs must show that the supervisor defendant had notice that the supervision was inadequate and likely to result in a constitutional violation. *Fowler*, 98 F.3d at 1078. "[A] single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisory liability." *Wever v. Lincoln County*, 388 F.3d 601, 607 (8th Cir. 2004) (quoting *Howard v. Adkison*, 887 F.2d 134, 138 (8th Cir. 1989)). "[T]his calculus is not rigid, and must change depending on the seriousness of the incident and its likelihood of discovery." *Id.*

Notably, the incidents involving the improper handling of the swords, stolen jewelry, traffic accidents, and uniform violation bear no relation to a claim of excessive force or unlawful detention. Also,

plaintiffs have failed to dispute that the allegation of stolen jewelry was made in error and recanted. Furthermore, it appears that almost every verified incident cited above resulted in some action, either a letter of reprimand or suspension. Plaintiffs have provided insufficient evidence that defendants Johnson or Paudert had notice of the remaining incidents, and in many instances, have failed to provide enough information to determine whether the alleged incidents occurred prior to June 22, 2007. Plaintiffs "may not rely merely on allegations or denials in its own pleading," rather they must "set out specific facts showing a genuine issue for trial." *Moore v. Indehar*, 514 F.3d 756, 757-58 (8th Cir. 2008) (citing Fed. R. Civ. P. 56(e)(2)).

As to the dog bite complaints, it is undisputed that Johnson abolished the canine patrol based upon said complaints, and thus, plaintiffs cannot demonstrate that he was deliberately indifferent or failed to take sufficient remedial action. Regarding the Howard incident, although Johnson and Paudert likely gained knowledge of the allegations at some point, it is entirely unclear what occurred that evening because the lawsuit was settled, and plaintiffs failed to provide any deposition testimony from Kathy Howard as to the factual allegations. Also, plaintiffs cannot demonstrate defendants Johnson and Paudert failed to act upon complaints of misconduct because it is undisputed that no written complaint was ever made with the City of West Memphis or the WMPD, and there is insufficient evidence that even a verbal complaint was made.

A supervisory official may also be liable if he created a policy or custom under which the unconstitutional practice occurred. *See Brown v.*

Missouri Dept. of Corrections, 353 F.3d 1038 (8th Cir. 2004); *Lansdown v. Chadwick*, 152 F. Supp. 2d 1128, 1146 (W.D. Ark. 2000), *aff'd*, 258 F.3d 754 (8th Cir. 2001) (citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir.1986)). As discussed below, plaintiffs have failed to present sufficient evidence of a policy or custom. Therefore, defendants Paudert and Johnson are entitled to summary judgment as to plaintiffs' section 1983 excessive force and unlawful detention/arrest claims.

B. Motion for Summary Judgment by Separate Defendant City of West Memphis (Doc. No. 44) and Motion for Summary Judgment (Doc. No. 78)

In order to hold the City of West Memphis liable under section 1983, a plaintiff must establish that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the city's officers]," or that a "constitutional deprivation [was] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." *Marchant v. City of Little Rock*, 741 F.2d 201, 204 (8th Cir. 1984) (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978)).

"Official policy involves 'a deliberate choice to follow a course of action . . . made from among various alternatives' by an official who [is determined by state law to have] the final authority to establish governmental policy." *Ware v. Jackson County, Mo.*, 150 F.3d 873, 880 (8th Cir.1998). "Alternatively, liability may be established through proof that the

alleged misconduct was so pervasive among the non-policy making employees of the municipality as to constitute a 'custom or usage' with the force of law." *McGautha v. Jackson County, Mo., Collections Dept.*, 36 F.3d 53, 56 (8th Cir. 1994). "This standard serves to prevent municipal evasion of liability through improper delegation of policy responsibility or acquiescence in pervasive constitutional violations by [] employees." *Id.* at 56-57.

"'[C]ustom or usage' is demonstrated by: (1) The existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) Deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) Th[e] plaintiff['s] injur[y] by acts pursuant to the governmental entity's custom, *i.e.*, [proof] that the custom was the moving force behind the constitutional violation." *Ware*, 150 F.3d at 882. "Liability for an unconstitutional custom or usage, however, cannot arise from a single act." *McGautha*, 36 F.3d at 57 (citing *Wedemeier v. City of Ballwin*, 931 F.2d 24, 26 (8th Cir. 1991) ("a single deviation from a written, official policy does not prove a conflicting custom or usage"); *Williams-El v. Johnson*, 872 F.2d 224, 230 (8th Cir. 1989) (one occurrence of improper prison guard hiring contrary to official written policy does not prove the existence of a conflicting custom or usage)).

With regard to the use of deadly force, defendants submit portions of the WMPD Policy and Procedures Manual, which provides, in part:

7: Deadly Force: Any force that when used can cause death or serious bodily injury. This is a last resort and only used when an officer perceives the threat of death or serious bodily injury is present and imminent against himself or third party. This in no way restricts the immediate escalation from a lower stop in the continuum to the "Deadly Force" step if justified and warranted for safety. All officers will adhere to the West Memphis Police Department "Deadly Force" policy. (Chapter 7- Section 2)[7]

. . .

SECTION: Deadly Force

The following policy will govern the use of deadly force and the investigative procedures thereof:

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[7] The *Farrow* plaintiffs submit a copy of WMPD Policy and Procedures, which provides a slightly different version of this paragraph:

> 7: Deadly Force: Physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury (5-2-601 (5)). This is the last resort and only used when an officer perceives the threat of death or serious bodily injury is present and imminent against himself or a third party. This in no way restricts the immediate escalation from a lower step in the continuum to the "Deadly Force" step if justified and warranted for safety. All officers will adhere to the West Memphis Police Department "Deadly Force" policy.

Policy and Procedure Manual, Exh. to *Farrow* Stmt. of Facts (Doc. No. 116).

1: Definitions:

a. Violent Felony – A felony in which the suspect has used, or threatened to use, force that will cause death or serious bodily injury.

b. Deadly Force – The amount of force that is sufficient to, intended to, or may be reasonably expected to inflict serious bodily injury and/or death. This includes the discharge of any firearm at, near, or in the direction of any individual.[8]

c. Juvenile – Any person under the age of eighteen (18) years.

d. Probable Cause – Facts and circumstances known to a reasonable and prudent police officer, which lead him to reasonably conclude that a crime has been committed and the suspect, committed it. Probable cause exists when facts and circumstances within an officer's knowledge, and of which he has reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been, or is being, committed. Probable cause is such belief as would appear

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[8] The *Farrow* plaintiffs submit a copy of WMPD Policy and Procedures, which defines "Deadly Force" as "Physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury (5-2-601(5)). Policy and Procedure Manual, Exh. to *Farrow* Stmt. of Facts (Doc. No. 116).

reasonable to the ordinary and prudent police officer of similar experience under like circumstances. Such belief is not reasonable if the officer is reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief of fact or of law which is material to the justifiability of his use of force.

e. Exhaustion of All Other Reasonable Means – All other reasonable means have been exhausted when an officer has tried to control conflict by using all alternate methods other than deadly force; however, all other reasonable means may be considered to have been exhausted when an officer analyzes a set of circumstances and honestly and reasonably concludes that any other means will be ineffective, useless, or hazardous to the officer or some innocent third party. In order to qualify as having exhausted all other reasonable means, the officer must be able to show that his/her use of deadly force was IMMEDIATELY necessary. The officer must also have communicated his identity and purpose to the suspect, unless these facts are already known by the suspect or cannot REASONABLY be made known to the suspect under the circumstances.

Where feasible, warning should be given the suspect by identifying himself/herself

as an officer, or by an oral order to halt, or by an oral warning that deadly force might be used. In deciding whether the use of deadly force is reasonably necessary, the officer must consider whether other action could eliminate the immediate need for deadly force.

2. Use of Deadly Force Authorized:

Officers shall use only the minimum amount of force, which is consistent with the accomplishment of their duties and must exhaust every other reasonable means of prevention, apprehension, or defense before resorting to the use of deadly force.

Pursuant to state law, deadly force may be used in the following circumstances, AFTER ALL OTHER REASONABLE MEANS OF APPREHENSION OR PREVENTION HAVE BEEN EXHAUSTED:

a. In self defense where the officer has been attacked with deadly force; is being threatened with the use of deadly force; or where the officer has probable cause and reasonably perceives an immediate threat of deadly force.

b. In defense of others where a third party has been attacked with deadly force; is being threatened with the use of deadly force; is in danger of serious bodily injury or death during the actual commission of a crime against his/her person; or where the officer has probable cause and

reasonably perceives an immediate threat of deadly force to a third party.

c. To prevent the commission of a violent felony in progress.

. . .

e. If the officer has probable cause to believe that a suspect poses a threat of serious physical harm to the officer or to others unless he/she is immediately apprehended.

. . .

3. Use of Deadly Force Prohibited:

The use of deadly force is prohibited in the following circumstances:

a. To apprehend or arrest a person for a misdemeanor offense.

. . .

d. To apprehend or arrest a person known to be or believed to be juvenile, unless the use of deadly force is immediately necessary in the defense of the officer's life or of another person's life when all other reasonable means have been exhausted. The officer's knowledge or belief of a person's age may be based upon factors such as the officer's previous knowledge of the person, his/her observations of the person's appearance, or upon reliable information given to him/her by other persons.

. . .

USE OF FORCE CONTINUUM

> The Use of Force Continuum is considered a step process in a series of control techniques that officers have at their disposal to bring a suspect under control. The Use of Force Continuum shall not restrict an officer's ability and means to bring a suspect under control, to protect themselves or a third party as it relates to their perception of the immediate situation. However, a certain and specific level of control or technique should be used with the minimum amount of force necessary.
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> . . .
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> There is no requirement or constitutional duty that police officers use all feasible alternatives to avoid a situation or to use non-deadly or less lethal alternatives first where deadly force can be justifiably used. (Plakas v. Drinski, U.S. Supreme Court)

See Attachment to Exhibit 2, Paudert's Aff., Defs.' Motions. Plaintiffs do not set forth any arguments, and the court cannot say, that this policy is unconstitutional.

"To establish a city's liability based on its failure to prevent misconduct by employees, the plaintiff must show that city officials had knowledge of prior incidents of police misconduct and deliberately failed to take remedial action." *Fowler*, 98 F.3d at 1075. Here, there is no evidence that the city was deliberately indifferent to complaints of excessive force or unlawful detention on the part of any officer, much less the existence of a continuing, widespread,

persistent pattern of unconstitutional misconduct by the city's employees that amounts to a city custom or policy of overlooking police misconduct. *Id.* at 1076. As discussed above, it appears that almost every verified incident cited by plaintiffs resulted in some action, either a letter of reprimand or suspension. Plaintiffs have provided insufficient evidence that the City of West Memphis had notice of several incidents, and in many instances, have failed to provide enough information to determine whether the alleged incidents occurred prior to June 22, 2007. Also, as discussed above, plaintiffs cannot demonstrate deliberate indifference or failure to take remedial measures as to the dog bite complaints, and have failed to adequately set forth support for factual allegations or any complaints made regarding the Howard incident. Furthermore, plaintiffs have failed to demonstrate the initial or continued detention implements or executes a policy or was visited pursuant to a custom of the WMPD, and failed to name any individual responsible for the continued detention of Nance. Plaintiffs "may not rely merely on allegations or denials in its own pleading," rather they must "set out specific facts showing a genuine issue for trial." *Moore*, 514 F.3d at 757-58 (citing Fed. R. Civ. P. 56(e)(2)). Thus, the City of West Memphis cannot be held liable under section 1983 for either the initial or continued unlawful detention or excessive force based on a theory of failure to investigate and prevent misconduct.

"A city also may be liable for deficient policies regarding hiring and training police officers where (1) the city's hiring and training practices are inadequate; (2) the city was deliberately indifferent to the rights of others in adopting them, such that the failure to train

reflects a deliberate or conscious choice by a municipality; and (3) an alleged deficiency in the city's hiring or training procedures actually caused the plaintiff's injury. *Fowler*, 98 F.3d at 1076. Plaintiffs have presented no evidence that the training of WMPD officers was deficient. Additionally, as discussed above, plaintiffs' claims regarding failure to train against defendants Johnson and Paudert fail, as defendants Sammis and Evans were adequately trained. Plaintiffs have failed to establish that the City of West Memphis had deficient policies or customs regarding hiring and training police officers, or that any alleged deficiency caused plaintiffs' injuries. Thus, the City of West Memphis cannot be held liable under section 1983 for either the initial or continued unlawful detention or excessive force due to hiring or training.

C. Pendent State Claims

The *Nance* plaintiffs assert violations of the Arkansas Civil Rights Act, wrongful detention, unlawful arrest, unreasonable seizure, unlawful search, assault and battery, false imprisonment, intentional infliction of emotional distress, gross negligence, and negligence. The *Farrow* plaintiffs assert violations of the Arkansas Civil Rights Act, wrongful death, false arrest, false seizure, assault and battery, gross negligence, and negligence.

1. Arkansas Civil Rights Act

Plaintiffs bring claims under the Arkansas Civil Rights Act. Arkansas Code Annotated § 16-123-105 provides:

> (a) Every person who, under color of any statute, ordinance, regulation, custom, or usage of this state or any of its political subdivisions subjects, or causes to be subjected, any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Arkansas Constitution shall be liable to the party injured in an action in circuit court for legal and equitable relief or other proper redress.
>
> . . .
>
> (c) When construing this section, a court may look for guidance to state and federal decisions interpreting the federal Civil Rights Act of 1871, as amended and codified in 42 U.S.C. § 1983, as in effect on January 1, 1993, which decisions and act shall have persuasive authority only.

The Arkansas Supreme Court has held that "Article 2, § 15, of the Arkansas Constitution is virtually identical to the Fourth Amendment," and thus has interpreted "it in the same manner as the United States Supreme Court interprets the Fourth Amendment." *Rainey v. Hartness*, 339 Ark. 293, 300, 5 S.W.3d 410, 415 (Ark. 1999). Therefore, the court's findings with respect to plaintiffs' claims under 42 U.S.C. § 1983 also apply with respect to plaintiffs' claims under the Arkansas Civil Rights Act.

2. Assault and Battery

Defendants assert that plaintiffs' claims for assault and battery fail because both require the intent to injure. Defendants further assert that there is no proof that either officer who encountered Nance on June 22,

2007, had any intent to create an apprehension of harmful or offensive contact or that harmful or offensive contact occurred and that was the officers' intent. Neither the *Nance* nor *Farrow* plaintiffs directly address defendants' assertions. The court notes that the affidavits of Sammis and Evans only state that they had no intent to inflict emotional distress on any of the plaintiffs. Based upon the facts submitted in this case, as discussed above, the court cannot grant summary judgment as to the assault and battery claims.

3. False Imprisonment[9]

Defendants assert that plaintiffs' claims of false seizure, arrest, and imprisonment fail because they had probable cause. *Mendenhall v. Skaggs Cos.*, 285 Ark. 236, 238, 685 S.W.2d 805, 806 (1985) ("[P]robable cause is a defense to a civil action for false arrest or false imprisonment in connection with a misdemeanor."). As discussed above, the facts do not clearly establish that the officers had probable cause, and therefore, summary judgment is denied.

4. Wrongful Death, Negligence, and Gross Negligence

Defendants assert that plaintiffs' claims on the basis of negligence, including wrongful death, are without merit because city employees are "immune

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[9] "False imprisonment and false arrest are used interchangeably in most courts. Technically, however, a false arrest is merely one type of false imprisonment; namely, when an arrest occurs under the pretense of legal authority." Howard W. Brill, *Arkansas Law of Damages*, § 33:3 (5th ed. 2004)

from suit for torts occasioned by any negligent act theymaycommit in the performance of their official duties." *Matthews v. Martin*, 280 Ark. 345, 345-46, 658 S.W.2d 374, 375 (1983) (distinguishing the suit from "one where a public official or employee is sued individually for a violation of a duty imposed upon that individual by law in common along with all other people"). Arkansas Code Annotated § 21-9-301 provides:

> (a) It is declared to be the public policy of the State of Arkansas that all . . . municipal corporations . . . and other political subdivisions of the state and any of their . . . agencies . . . shall be immune from liability and from suit for damages except to the extent that they may be covered by liability insurance.
>
> (b) No tort action shall lie against any such political subdivision because of the acts of its agents and employees.

Plaintiffs do not specifically address defendants' argument.

In *Davis v. Fulton County*, 884 F. Supp. 1245, 1262 (E.D. Ark. 1995), this court held that Arkansas Code Annotated § 21-9-301 provided the defendants "with immunity for all covered claims brought against them in their individual capacities, as the[] defendants [were] alleged to have violated a duty of care imposed upon them only by virtue of their official positions (as opposed to a duty that is generally applicable to society as a whole)." The court reasoned that "while the pleading distinction between 'official capacity' liability and 'individual capacity' liability remains relevant in

§ 1983 actions alleging official misconduct by public officials, this distinction is of no moment when determining the scope of the immunity afforded by§ 21-9-301 in any analogous tort actions." *Id.* at 1262 n.22. *See also Davis v. Fulton County*, 90 F.3d 1346, 1353 (8th Cir. 1996) (affirming the district court's ruling on this issue).

Here, it appears that the defendants were performing official city functions at the time of the incident, and are alleged to have violated a duty of care imposed upon them only by virtue of their official positions. Defendants are entitled to statutory immunity for the state law claims of negligence and wrongful death based on a theory of negligence, as defendants state that the City of West Memphis maintains no insurance covering the state law negligence claims asserted. Plaintiffs' claims of gross negligence remain, however, as it is not clear that the statutory immunity provision applies to such claims. *See Doe v. Baum*, 348 Ark. 259, 278, 72 S.W.3d 476, 487 (Ark. 2002) (noting that *Black's Law Dictionary* defines "gross negligence" as "[t]he intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another"); *Spence v. Vaught*, 236 Ark. 509, 512-13, 367 S.W.2d 238, 240 (Ark. 1963) ("Gross negligence is the failure to use even slight care."). To the extent the *Farrow* plaintiffs can proceed with a wrongful death claim based upon gross negligence, that claim also survives.

5. Intentional Infliction of Emotional Distress

As to plaintiffs' claims of intentional infliction of emotional distress, "[t]o establish a claim for the tort

of outrage, a plaintiff must demonstrate the following elements: (1) the actor intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of his conduct; (2) the conduct was 'extreme and outrageous,' was 'beyond all possible bounds of decency,' and was 'utterly intolerable in a civilized community;' (3) the actions of the defendant were the cause of the plaintiff's distress; and (4) the emotional distress sustained by the plaintiff was so severe that no reasonable person could be expected to endure it." *Marlar v. Daniel*, 368 Ark. 505, - - S.W.3d - - (2007) (citing *Crawford v. Jones*, 365 Ark. 585, - - S.W.3d - - (2006)).

Here, the *Nance* plaintiffs admit that none of the separate defendants had the intent to inflict emotional distress on any of the plaintiffs. *Nance* Stmt. of Facts at ¶ 40. It is unclear, however, whether the *Nance* plaintiffs can demonstrate that defendants "knew or should have known that emotional distress was the likely result" of the conduct. The *Farrow* plaintiffs dispute defendants statement that none of the separate defendants had the intent to inflict emotional distress on any of the plaintiffs. *Farrow* Stmt. of Facts at ¶ 37. Taking the facts in light most favorable to plaintiffs, summary judgment is not appropriate at this time as to plaintiffs' claims of intentional infliction of emotional distress.

D. Other Claims Not Addressed on Summary Judgment

1. Conspiracy to Deprive Civil Rights Claims

In their complaints, both the *Nance* and *Farrow* plaintiffs state general 42 U.S.C. § 1985(3) allegations,

and also cite 42 U.S.C. § 1986.[10] To prove a § 1985(3) claim, a complaint must allege that the defendants did (1) conspire; (2) "for the purpose of depriving, either directlyor indirectly, any person or class of persons of the equal protection ofthe laws, or of equal privileges and immunities under the laws;" and (3) that one or more of the conspirators did, or caused to be done, "any act in furtherance of the object of [the] conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States." *Fowler*, 98 F.3d at 1079. "The plaintiff must show that the conspiracy is fueled by some "class-based, invidiously discriminatory animus." *Id*. "Additionally, to succeed on a civil rights conspiracy claim, the plaintiff must demonstrate discriminatory purpose in that the defendants selected the particular course of action 'because of' not merely 'in spite of' its adverse effects upon an identifiable group." *Id*. at 1080.

"Title 42 U.S.C. § 1986 provides a cause of action against '[e]very person who, having *knowledge* that any of the wrongs conspired to be done, and mentioned in section 1985 of . . . [T]itle [42], are *about to be committed*, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do so, if such wrongful act be committed.'" *Brandon v. Lotter*, 157 F.3d 537, 539 (8th Cir. 1998) (quoting *Hartnagel v. Norman*, 953 F.2d 394, 396 (8th Cir. 1992)). "Liability under § 1986 is dependent on proof of actual knowledge by a defendant of the

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[10] The court notes that plaintiffs also cite 42 U.S.C. § 1988, which is the provision regarding the applicability of statutory and common law and attorney's fees.

wrongful conduct." *Id.* (internal quotations omitted). In order to maintain a section 1986 action, plaintiffs must prove that: "(1) [the defendant] had actual knowledge of a § 1985 conspiracy, (2) [the defendant] had the power to prevent or aid in preventing the commission of a § 1985 conspiracy, (3) [the defendant] neglected or refused to prevent a § 1985 conspiracy, and (4) a wrongful act was committed." *Id.* "[F]irsthand knowledge is not required under § 1986. The courts have nevertheless required 'actual knowledge.'" *Id.* "[R]ecovery under section 1986 is dependent on the existence of a claim under section 1985." *McIntosh v. Arkansas Republican Party-Frank White Election Committee*, 766 F.2d 337, 340 (8th Cir. 1985).

In their response to defendants' statement of facts, the *Nance* plaintiffs admit that none of the separate defendants' material actions alleged in this case were motivated by racial animus or other unconstitutional motives. *Nance* Stmt. of Facts at ¶ 57. Therefore, it appears that the *Nance* plaintiffs have abandoned these claims. In their response to defendants' statement of facts, however, the *Farrow* plaintiffs state that this is a jury question, but they provide no support for this assertion. Neither the defendants nor the plaintiffs, however, discuss these claims in their briefs. Therefore, the court declines to dismiss these claims at this time.

2. Equal Protection

Similarly, because the *Nance* plaintiffs admit that none of the separate defendants' material actions alleged in this case were motivated by racial animus or other unconstitutional motives, it appears that they have abandoned their equal protection claims. *Fowler*,

98 F.3d at 1079 (finding that plaintiff's claim did not implicate equal protection because plaintiff made no showing that the alleged failure to investigate was on account of her gender). Because neither party has discussed this claimin their briefs, the court declines to dismiss the equal protection claim at this time.

3. Individual Claims by Unseld Nance, Sr., Pamela Farrow, Debra Farrow, and Robin Perkins

In their complaint, the *Farrow* plaintiffs assert that "Debra Farrow and Robin Perkins had the constitutional right to have the association of their son, to direct the education of their son, and to enjoy the love and affection of their son," and "have the clearly established First Amendment right to have the unabridged association of their son as well as other personal rights thus guaranteed in their role as parents." In their complaint, the *Nance* plaintiffs allege that Unseld Nance, Sr. "was denied his right to custody of his son and forced to remain at the West Memphis Police Station until the Arkansas State Police arrived" and "sustained a constitutional injury pursuant to the unlawful threat of separation from his son." They also allege that Pamela Farrow "had the right to have parented her son undamaged by the defendants conduct." The *Nance* plaintiffs also vaguely assert a First Amendment claim.

The Eighth Circuit has "recognized a right to familial relations, which includes the liberty interest of parents in the custody, care, and management of their children." *King v. Olmsted County*, 117 F.3d 1065, 1067 (8th Cir. 1997) (citing *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1370-71 (8th Cir.

1996) (quoting *Manzano v. South Dakota Dep't of Soc. Servs.*,60 F.3d 505, 509-11 (8th Cir. 1995))). Several courts, however, have held that it is a "well-settled principle that a section 1983 claim must be based upon the violation of plaintiff's personal rights, and not the rights of someone else." *See, e.g.*, *Archuleta v. McShan*, 897 F.2d 495, 497 (10th Cir. 1990) (holding that son had no liberty interest to be free of emotional trauma suffered as a result of observing allegedly excessive police force which was directed entirely at his father); *Coon v. Ledbetter*, 780 F.2d 1158, 1160-61 (5th Cir. 1986) (holding that a wife who witnessed sheriff's deputies shooting in her mobile home and wounding her husband had no constitutional claim for emotional injuries); *Trujillo v. Bd. of County Comm'rs*, 768 F.2d 1186 (10th Cir. 1985) (rejecting the claim by a mother and daughter against various public officials that the wrongful death of their son and brother while incarcerated in a county jail deprived them of their constitutional right of familial association because there was no showing that the jailers directed any activity toward the familial relationship with an intent to interfere with that relationship).

In *Reasonover v. St. Louis County*, 447 F.3d 569, 585 (8th Cir. 2006), the Eighth Circuit stated that "[a] defendant can be held liable for violating a right of intimate association only if the plaintiff shows an intent to interfere with the relationship." There, the Eighth Circuit held that plaintiff could not support her claim that defendants violated her right to familial association as a result of her incarceration because she "presented no evidence that the defendants had the intent to interfere with the relationship" between plaintiff and her daughter. *Id.* The court further held that even if plaintiff had presented such evidence, "any

right to familial association was not sufficiently clear such that the defendants reasonably could have understood theywere violating it" because neither the Supreme Court nor the Eighth Circuti "has clearly held wrongful prosecution and incarceration of a family member violates a right to familial association." *Id*. *See also Harpole v. Ark. Dep't of Human Servs*., 820 F.2d 923, 927-28 (8th Cir. 1987) (overruled on other grounds) ("Protecting familial relationships does not necessarily entail compensating relatives who suffer a loss as a result of wrongful state conduct, especially when the loss is an indirect result of that conduct."); *Helleloid v. Indep. Sch. Dist. No. 361*, 149 F. Supp. 2d 863, 873-74 (D. Minn. 2001).

On this basis, the court has some doubt as to the ability of plaintiffs to pursue these claims. Additionally, because no defendants remain as to the continued detention of Nance, the court doubts whether the claims of Nance's parents can survive since the initial detention appears to have occurred over a short period of time, and Nance's parents were likely not present during the initial detention. Furthermore, the court questions whether the parents' claims against the City of West Memphis, Johnson, and Paudert fail if the City of West Memphis, Johnson, and Paudert are not liable for any of the underlying alleged constitutional deprivations. Because these issues have not been addressed on summary judgment, however, the claims of the parents of Nance and Farrow remain.

4. Unknown Arkansas State Police Officers

As discovery in this case is closed, and it appears that plaintiffs have failed to properly identify and

serve the unknown Arkansas State Police Officer defendants, dismissal of these defendants is likely warranted. Fed. R. Civ. P. 4(m). Additionally, as plaintiffs have only named the unknown Arkansas State Police Officers in their official capacities, these claims are actually against the State of Arkansas. Thus, it appears that plaintiffs claims against the unknown Arkansas State Police officers are "tantamount to a suit against the state" and are barred by sovereign immunity. *See Simons v. Marshall*, 369 Ark. 447, 451, 255 S.W.3d 838, 841-42 (2007). Once again, this issue was not addressed on summary judgment, but the court will entertain pre-trial motions as to the unknown Arkansas State Police Officers.

VI. CONCLUSION

As to the *Nance* plaintiffs, their claims pursuant to 42 U.S.C. § 1983 with regard to excessive force and the initial unlawful detention/arrest, and parallel Arkansas Civil Rights Act claims, against Sammis and Evans survive. The excessive force and unlawful detention section 1983 claims, and parallel Arkansas Civil Rights Act claims, against the City of West Memphis, defendant Johnson, and defendant Paudert are dismissed. The state law assault and battery claim, false imprisonment claim, the intentional infliction of emotional distress claim, and gross negligence claim survive summary judgment, but the negligence claim is dismissed. Defendants failed to address the *Nance* plaintiffs' conspiracy claim pursuant to 42 U.S.C. § 1985(3), and related 42 U.S.C. § 1986 claim, equal protection claim, and the individual claims of Nance's parents, and thus, these claims remain.

As to the *Farrow* plaintiffs, their claims pursuant to 42 U.S.C. § 1983 with regard to excessive force and the initial unlawful detention/arrest, and parallel Arkansas Civil Rights Act claims, against Sammis and Evans survive. The excessive force and unlawful detention section 1983 claims, and parallel Arkansas Civil Rights Act claims, against the City of West Memphis, defendant Johnson, and defendant Paudert are dismissed. The state law assault and battery claim, false imprisonment claim, intentional infliction of emotional distress claim, and gross negligence claim, including any cognizable wrongful death claim based upon gross negligence, survive summary judgment, but the negligence claim is dismissed. Defendants failed to address the *Farrow* plaintiffs' conspiracy claim pursuant to 42 U.S.C. § 1985(3), and related 42 U.S.C. § 1986 claim, equal protection claim, and the individual claims of Nance's parents, and thus, these claims remain.

Accordingly, the individual defendants' motion to exclude testimony of plaintiffs' expert (Doc. No. 87) is granted. The motion for summary judgment filed by separate defendants Sammis, Evans, Johnson, and Paudert, in their individual capacities (Doc. No. 38) and supplement (Doc. No. 82); and the motion for summary judgment on the basis of qualified immunity filed by separate defendants Sammis, Evans, Johnson, and Paudert, in their individual capacities (Doc. No. 40) and supplement (Doc. No. 83); filed with regard to the *Nance* case are granted in part, and denied in part, as stated herein. The motion for summary judgment filed by separate defendants Sammis, Evans, Johnson, and Paudert, in their individual capacities (Doc. No. 75); and the motion for summary judgment on the basis of qualified immunity filed by separate

defendants Sammis, Evans, Johnson, and Paudert, in their individual capacities (Doc. No. 80); filed with regard to the *Farrow* case are granted in part, and denied in part, as stated herein. The motions for summary judgment filed by separate defendant the City of West Memphis (Doc. Nos. 44 and 78) with regard to the *Nance* and *Farrow* cases are granted as stated herein.

IT IS SO ORDERED THIS 5th day of February, 2009.

/s/Brian G. Miller
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 09-1353

[Filed December 15, 2009]

Unseld Nance, Sr., individually and as the natural father and next friend of Unseld Nance, Jr.; Pamela Farrow,

Appellees

v.

Erik Sammis, individually; et al.,

Appellants

City of West Memphis, Arkansas and Unknown Arkansas State Police Officers, in their official capacity,

---

Deborah Farrow, individually and as co-administrator of the Estate of DeAunta Farrow and Robin Perkins, individually and as co-administrator of the Estate of DeAunta Farrow,

Appellees

v.	)
	)
Erik Sammis, individually and in official capacity as Officer of West Memphis Police Department, et al.	)
	)
Appellants	)
	)
City of West Memphis, Arkansas,	)
	)

Appeal from U.S. District Court for the
Eastern District of Arkansas - Jonesboro
(3:07-cv-00119-BSM) (3:07-cv-00189-BSM)

ORDER

The petition for rehearing en banc is Denied. The Petition for rehearing by the panel is also denied.

December 15, 2009

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

163

(2)

Nº. 09-1115

Supreme Court, U.S.
FILED
JUN 7 - 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

ERIK SAMMIS, INDIVIDUALLY AND
JIMMY EVAN, INDIVIDUALLY,
Petitioners,
v.

UNSELD NANCE, SR, INDIVIDUALLY AND
AS THE NATURAL FATHER AND NEXT FRIEND OF
UNSELD NANCE, JR., ET AL.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eight Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Eighth Circuit was correct in holding that a police officer may be held liable on a claim under 42 U.S.C. §1983 for failing to act to prevent another officers use of excessive force where the use of excessive force occurred within an interval of time such that a reasonable officer faced with the same circumstances would have had a realistic opportunity to intervene.

Whether when the surrounding factual circumstances are in dispute as to the disobedience of a police officers command during an alleged threat by the deceased, material questions of fact shall prevent granting summary judgment on the basis of qualified immunity.

Whether a minor party's deposed testimony that corrected his or her prior statement to state police after prolonged interrogation and detainment is sufficient to create a material question of fact when that correction is closely aligned with the medical examiner's deposition, and thereby avoid a summary judgment ruling on the defense of qualified immunity.

LIST OF PARTIES

Petitioners: Erik Sammis ("Sammis") and Jimmy Evans ("Evans").

Respondents: Unseld Nance, Sr. individually and as the natural father and next friend of Unseld Nance, Jr.; Pamela Farrow; and Debra Farrow and Robin Perkins. Individually and as co-administrators of the Estate of DeAunta Farrow.

Defendants and Respondents below: City of West Memphis, Arkansas; Robert Paudert; and William Johnson.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

INTRODUCTION 3

STATEMENT OF THE CASE AND THE FACTS 4

A. Factual Background 4

B. Procedural History 9

ARGUMENT FOR DENYING THE WRIT 11

I. THE EIGHTH CIRCUIT PROPERLY RULED THAT A POLICE OFFICER MAY BE

HELD LIABLE ON A CLAIM UNDER 42 U.S.C. §1983 FOR FAILING TO ACT TO PREVENT ANOTHER OFFICERS USE OF FORCE WHERE A REASONABLE OFFICER FACED WITH THE SAME CIRCUMSTANCES WOULD HAVE HAD A REALISTIC OPPORTUNITY TO INTERVENE 11

2. THE EIGHTH CIRCUIT PROPERLY RULED THAT MATERIAL QUESTIONS OF FACT DO EXIST AND PROPERLY PREVENT GRANTING SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY TO THE OFFICERS 13

3. THE EIGHTH CIRCUIT PROPERLY RULED THAT WHEN THE MINOR PARTY'S DEPOSED CHANGE IN TESTIMONY CORRECTED HIS PRIOR STATEMENT TO STATE POLICE AFTER PROLONGED INTERROGATION AND

DETAINMENT, SUCH CORRECTION WAS SUFFICIENT TO CREATE A MATERIAL QUESTION OF FACT THEREBY AVOIDING A SUMMARY JUDGMENT RULING ON THE DEFENSE OF QUALIFIED IMMUNITY TO THE OFFICERS 15

CONCLUSION 18

TABLE OF AUTHORITIES

Cases **Page(s)**

Cavataio v. City of Bella Villa,
570 F.3d 1015, 1019 (8th Cir. 2009) 15

Craighead v. Lee,
399 F.3d 954, 962 (8th Cir. 2005) 11, 16

Hoyd v. City of Detroit,
518 F.3d 398, 406 (6th Cir. 2008) 13, 14

Henderson v. Munn,
439 F.3d 497, 501-02 (8th Cir. 2006) 15

Hope v. Pelzer,
536 U.S. 730, 739 (2002) 14

Krout v. Goemmer,
2009 WL 3172180, at *5 (8th Cir. Oct. 6, 2009) . . 13

Ngo v. Storlie,
495 F.3d 597, 603 (8th Cir. 2007) 14

Pearson v. Callahan,
129 S. Ct. 808, 815-16 (2009) 15, 17

Plemmons v. Roberts,
439 F.3d 818, 822 (8th Cir. 2006) 15

OPINIONS BELOW

The decision of the court of appeals is reported at 586 F.3d 604. The decision of the U.S. District Court for the Eastern District of Arkansas is not officially reported but is available at 2009 U.S. Dist. LEXIS 13009.

JURISDICTION

The Eighth Circuit issued judgment on November 10, 2009. Respondent agrees that petitioners timely filed a petition for rehearing and rehearing *en banc* was denied on December 15, 2009. Respondent denies that jurisdiction for the Eighth Circuit's consideration of interlocutory appeal of the District Court's denial of qualified immunity is pursuant to 28 U.S.C. § 1291. Respondent denies that jurisdiction before this court is invoked under 28 U.S.C. § 1254(1).

STATUTES RAISED

The Fourth Amendment to the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 42 U.S.C. §1983 of the United States Code provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State,..., subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,...

Rule 56(c)(2) of the Federal Rules of Civil Procedure provides in pertinent part:

> The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.

INTRODUCTION

This case arises from the fatal shooting of DeAunta Farrow and seizure of Unseld Nance by two police officers in West Memphis, Arkansas. The families of Farrow and Nance brought this action under 42 U.S.C. § 1983 and state law against the two officers, as well as the chief of police, the mayor, and the city, alleging in particular excessive force and unreasonable seizure in violation of the Fourth Amendment. The district court denied summary judgment to the officers on the basis of qualified immunity, but granted the summary judgment motions of the chief of police, the mayor, and the city.

STATEMENT OF THE CASE AND THE FACTS

A. FACTUAL BACKGROUND

On June 22, 2007, the West Memphis police department alleges to have received information after dark, that two or three black males were going to rob a particular convenience store. Seven members of the Special Response Team, including defendant officers Erik Sammis and Jimmy Evans, were allegedly ordered to conduct surveillance in the area of the convenience store. Four were stationed in a vehicle one block south of the store, another was positioned across the street from the store, and officers Sammis and Evans were located about two blocks to the north.

Officers Sammis and Evans were parked in a dark gray, unmarked pickup truck in the parking lot of an apartment complex. They were wearing camouflage pants, dark grey shirts, and black bulletproof vests. Only the backs of their vests had the word "POLICE" written on them. The fronts of the vest were unidentifiable, it was very dark and the area surrounding the apartment complex was poorly lit. At about 10:00 p.m. the officers noticed two black males, later identified as twelve-year old DeAunta Farrow and fourteen-year old Unseld Nance, walking toward the apartment complex. Farrow was on the officers' right; Nance was on their left.

The parties disagree as to what happened next. According to Nance, he and Farrow were walking to the apartment building to retrieve his cell phone. Farrow had a toy gun tucked into the waistband of his pants. The gun was gray with a black handle, and it had an orange cap at the tip of the barrel. As the two boys neared the apartment building, they saw two men get out of a dark pickup truck. The unidentifiable men pointed flashlights and guns at them and one shouted, "Get on the ground and drop the gun." Nance immediately dropped to the ground, but Farrow remained standing.

Nance says the men did not identify themselves as police, nor did they have a visible badge or patch to signify that they were law enforcement officers. The next thing he heard was a gunshot. He contends that Farrow was shot while "fixing to get on the ground" and while the toy gun was still tucked into his waistband. Nance does not recall hearing any warnings from the men before the shooting.

Officers Sammis and Evans report that as the boys approached, they saw something in Farrow's right hand that appeared to be a handgun. They got out of their truck with their guns drawn and flashlights on. Sammis claims that he shouted, "Police!" and ordered Farrow to drop his gun. Although Nance hit the ground immediately, both officers say Farrow remained standing and did not

drop his weapon despite repeated commands to do so and that he raised his right hand while still holding the gun. Sammis then fired two rounds in rapid succession. Two shots hit Farrow.

Sammis told Evans to handcuff Nance while he bent over Farrow who was lying face down on the parking lot. Sammis says he asked Farrow if he had been hit and that he responded, "Yeah. It's only a toy gun." Sammis rolled Farrow to his side and found the toy gun underneath him at waist level. Appellees contend that it was still tucked into Farrow's waistband.

Evans contacted headquarters to report the shooting and the injuries to Farrow. The other members of the surveillance team hurried to the scene, and Evans relinquished control of Nance to the other officers. Sammis and Evans contend that they had custody of Nance for no more than 10 minutes and that he was still handcuffed when they turned him over. Nance asserts that he was handcuffed for almost 30 minutes at the scene of the shooting and while being transported to the police station. Paramedics attempted to stabilize Farrow once they arrived, but their efforts were unsuccessful and he died at the scene.

An Arkansas state police officer conducted a videotaped interview of Nance less than three hours after the shooting. During the interview, Nance stated that he and Farrow had been

walking to their cousin's apartment when "two people got out of the car and pointed guns." They told Farrow and him to get on the ground and "to put the gun down." Nance reported that the two men did not identify themselves and that he had initially thought "they was people playing." Nance later stated that it had occurred to him that the men might be police officers because of how they shouted, but he repeatedly said that the men did not identify themselves and that he had not seen any police badge or patch on their clothing.

When asked about the gun, Nance demonstrated to the state police officer how Farrow had the barrel of the toy gun tucked into his waistband while they walked to the apartment building. Nance reported that Farrow had been covering the handle of the gun with his right hand and that he never removed the gun from his waistband during their walk. Nance also showed the officer how Farrow had raised his hands up after they were ordered to get on the ground. It was unclear from his oral statement and demonstration whether Nance meant that Farrow had the gun in his hand at that point or whether it remained in his waistband.

At the conclusion of the interview, the state police officer drafted a summary statement for Nance, a minor, to sign. It states in relevant part:

> DeAunta was carrying with his right hand as we walked it was under his shirt with the handle showing. We saw 2 men get out of a black pickup truck by a dumpster they had two flashlights. Then one of them said get on the ground. I got on the ground DeAunta was standing. His arms were partially raised up with the toy gun in his right hand. I was looking straight and didn't see the men. They said drop the gun. DeAunta was fixing to get on the ground when they shot.

During his deposition, however, Nance corrected his earlier statement given under police interrogation and testified that Farrow had still had the toy gun "tucked in his pants" at the time officer Sammis fired his weapon.

The medical examiner assigned to the case, Dr. Daniel Konzelman, testified that based upon the trajectory of the bullet wounds in Farrow's body, it was unlikely he had both hands raised at the time he was shot. Dr. Konzelman also stated that the trajectory indicated that Farrow's left arm was not raised but that he could not determine the position of Farrow's right arm.

B. PROCEDURAL BACKGROUND

Nance's parents filed their action in the federal district court, individually and on behalf of their son, against officers Sammis and Evans, the chief of police, the mayor, and the city. They alleged violations of the First, Fourth, and Fourteenth Amendments, as well as various state law claims. Thereafter, Farrow's parents brought their action, individually and on behalf of the estate of their deceased son, against the same defendants alleging violations of the Fourth and Fourteenth Amendments and state law. The two cases were consolidated. All defendants moved for summary judgment with the individual defendants seeking qualified immunity.

The district court analyzed the excessive force and unreasonable seizure claims against officers Sammis and Evans under the Fourth Amendment, concluding that appellees had presented sufficient evidence for a reasonable jury to determine that the officers' actions violated clearly established constitutional rights of Nance and Farrow. The court determined that the pretrial record contained genuine issues of material fact as to "whether Farrow held a toy gun in his hand that could be mistaken for a real gun and [whether he] raised it toward Sammis, or if the toy gun was 'tucked in' Farrow's pants at the time Sammis fired his weapon." The district court concluded that these questions precluded qualified immunity on

appellees' claims arising from the shooting. The officers now appeal those decisions.

The court concluded that the two officers could not however be held liable for the prolonged detention of Nance after he was turned over to others at the scene of the shooting. The court noted that, "although the continued detention of Nance appears to have been unnecessary and unwarranted, plaintiffs have failed to name any individual responsible for the detention." The court granted qualified immunity to Sammis and Evans as to the continued detention and that has not been appealed.

Finding no basis for municipal liability, the district court granted summary judgment to the city. The court also granted summary judgment to the chief of police and the mayor on the §1983 claims, concluding that appellees provided insufficient evidence to support a finding of supervisor liability. The chief of police and the mayor filed a petition to appeal if the district court's order were interpreted to permit any state law claims to survive against them, but no appeal was taken with respect to them.

The court of appeals found that significant factual disputes remain with respect to the shooting of DeAunta Farrow and seizure of Unseld Nance. The current record before the court did not conclusively establish whether the actions of

officers Sammis and Evans were objectively reasonable, therefore the Eighth Circuit affirmed the ruling of the district court denying the officers summary judgment.

ARGUMENT FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT APPELLATE COURT PROPERLY RULED THAT A POLICE OFFICER MAY BE HELD LIABLE ON A CLAIM UNDER 42 U.S.C. §1983 FOR FAILING TO ACT TO PREVENT ANOTHER OFFICERS USE OF EXCESSIVE FORCE WHERE THE USE OF EXCESSIVE FORCE OCCURRED WITHIN AN INTERVAL OF TIME SUCH THAT A REASONABLE OFFICER FACED WITH THE SAME CIRCUMSTANCES WOULD HAVE HAD A REALISTIC OPPORTUNITY TO INTERVENE.

The right to be "free from excessive force in the context of an arrest is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures." *Samuelson v. City of New Ulm*, 455 F.3d 871, 877 (8th Cir. 2006). There is extensive case law setting forth the requirement that an officer must have "probable cause to believe that the suspect poses a threat of serious physical harm" before using deadly force. *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir. 2005) (collecting cases that put officers on notice that they may not use deadly force under circumstances in which "they should know that the

suspect does not present an immediate threat of serious physical injury or harm"). The right of Farrow and Nance to be free from the use of deadly force was clearly established in June 2007, the time of the shooting. Existing case law would have made it sufficiently clear to a reasonable officer that a suspect cannot be apprehended by use of deadly force unless that individual poses a threat of serious physical harm. In this case, the facts are disputed and there is no basis in which the court can undeniably believe that DeAunta Farrow posed a threat of serious physical harm to either officer.

Officer Evans was also denied qualified immunity in the district and appellate court on the issue of excessive force and unreasonable seizure. The claims against Evans are based not only on the use of excessive force but also the failure to prevent its use for which there was the apparent opportunity. Respondents' district court complaints alleged that officer Evans "made no efforts to prevent the Defendant Sammis from violating the rights" of Farrow and Nance. The Eighth Circuit was long recognized that "one who is given the badge of authority of a police officer may *not ignore the duty imposed by his office*" [emphasis added] by failing to act to prevent the use of excessive force. *Putnam v. Gerloff*, 639 F.2d 415, 423 (8th Cir. 1981). As of June 2007, it was clearly established that an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth

Amendment. *Krout* v. *Goemmer*, 2009 WL 3172180, at *5 (8th Cir. Oct. 6, 2009) (finding case law clearly established on this constitutional right as of July 2006).

2. THE EIGHTH CIRCUIT PROPERLY RULED THAT MATERIAL QUESTIONS OF FACT DO EXIST THAT PROPERLY PREVENT GRANTING SUMMARY JUDGMENT TO THE OFFICERS ON THE BASIS OF QUALIFIED IMMUNITY.

It is erroneous for the Petitioner Evans to argue that he is entitled to the defense of qualified immunity on an excessive force claim solely on the basis that he had not personally participated in the use of deadly force, which injured the plaintiff. In a similar case, the Sixth Circuit rejected an officer's argument for qualified immunity on an excessive force claim on those grounds. *Floyd* v. *City of Detroit*, 518 F.3d 398, 406 (6th Cir. 2008). As the court explained, a police officer who fails to act to prevent the use of excessive force *may still be held liable* where (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer *had both the opportunity and the means* to prevent the harm from occurring [emphasis added]. In *Floyd*, like the present case, the officer had "participated in the tactical decision that he and [his partner] would confront Floyd with their guns drawn, without any verbal warning." *Id.* at 407. The officer had failed to protect the Floyd, and the fact that he was not the

shooter did not absolve him of his responsibility. *Id.* Here, Evans confronted the boys with his gun drawn in a poorly lit parking lot at night. Neither Evans or Sammis identified themselves as law enforcement officers and Evans admits that he failed to give any warning as to the possible use of deadly force or try to stop Sammis from shooting. Evans' failure to take action to de-escalate the situation if he had an opportunity and means to do so could establish liability. *Floyd*, 518 F.3d at 406; *Ngo v. Storlie*, 495 F.3d 597, 603 (8th Cir. 2007) (holding qualified immunity inappropriate where "a warning . . . was feasible and the failure to take an extra moment to assess the situation" added to the unreasonableness of the officer's actions). Because of factual disputes by the parties and without impermissible factual determinations of exactly what occurred that evening, the neither the appellate court or this court could conclude that Evans is entitled to qualified immunity.

Further, the Eighth Circuit appellate court was correct in ruling that "qualified immunity protects government officials from liability under § 1983 when their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The test for whether an officer is entitled to qualified immunity is twofold: (1) whether the facts alleged, taken in the light most favorable to the injured party, show that the officer's conduct violated a constitutional

right; and (2) whether the constitutional right was clearly established at the time of the deprivation so that a reasonable officer would understand his conduct was unlawful. *Pearson v. Callahan*, 129 S. Ct. 808, 815-16 (2009); *Henderson v. Munn*, 439 F.3d 497, 501-02 (8th Cir. 2006). If no reasonable factfinder could answer yes to both of these questions, the officer is entitled to qualified immunity. See *Plemmons v. Roberts*, 439 F.3d 818, 822 (8th Cir. 2006)."

3. THE EIGHTH CIRCUIT APPELLATE COURT PROPERLY RULED THAT WHEN THE MINOR PARTY'S DEPOSED CHANGE IN TESTIMONY CORRECTED HIS PRIOR STATEMENT TO STATE POLICE AFTER PROLONGED INTERROGATION AND DETAINMENT, SUCH CORRECTION WAS SUFFICIENT TO CREATE A MATERIAL QUESTION OF FACT THEREBY AVOIDING A SUMMARY JUDGMENT RULING ON THE DEFENSE OF QUALIFIED IMMUNITY TO THE OFFICERS.

The appellate court's review of the district court's denial of qualified immunity de novo, was based upon having viewed the facts in the light most favorable to the nonmoving parties and drawing all reasonable inferences in their favor. *Cavataio v. City of Bella Villa*, 570 F.3d 1015, 1019 (8th Cir. 2009). Denial of qualified immunity was affirmed because "a genuine issue of material fact exists as to whether a reasonable officer could have believed his actions to be lawful."

Craighead, 399 F.3d at 960. Respondents contend that this was a proper review.

The officers contend that instead Farrow began to raise his arms toward the officers while holding the gun in his right hand. Sammis testified that he had yelled, "Police" at the outset of the encounter and that he shouted, "No!" before firing his weapon in the direction of Farrow and Nance.

Nance, the only other living witness to the shooting, related a different set of facts creating a controverted record. He testified in his deposition that the weapon was just a toy gun, that it remained tucked in Farrow's waistband during the confrontation with the officers, and that Farrow was "fixing to get on the ground" at the time he was shot. Nance did not remember hearing officer Sammis yell, "Police" or "No!" prior to firing. In his prior interview with the state police, Nance stated that Farrow had raised his hands before he was shot. Dr. Konzelman testified in his deposition that it was unlikely that Farrow was raising both arms at the time he was shot, based upon the trajectory of the bullet wounds in his body and more consistent with Nance's latter testimony at the deposition.

When viewing the material question of fact and the controverted record in the light most favorable to the nonmoving parties, the court must presume that the officers approached Farrow and Nance without identifying themselves as police

officers, that the toy gun was tucked in Farrow's pants throughout the entire confrontation, that Sammis only said to drop the gun and get on the ground, and that Farrow may have raised his hand or hands while trying to get to the ground before Sammis shot him twice without warning. These facts taken in the light most favorable to appellees could establish the excessive use of force and unreasonable seizure in violation of Farrow and Nance's Fourth Amendment rights. *Pearson*, 129 S. Ct. at 815-16.

CONCLUSION

In conclusion, because the court of appeals determined that significant factual disputes remain with respect to the shooting of DeAunta Farrow and seizure of Unseld Nance, and that impermissible factual determinations of exactly what occurred on the evening of the shooting, they properly could not conclude at the appellate stage that Evans or Sammis are entitled to qualified immunity and because the current record did not conclusively establish whether the actions of officers Sammis and Evans were objectively reasonable, the Respondents request that the Petitioners be denied certiorari.

Respectfully submitted,

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